CORRESPONDENCE FROM APPLICANT

March 31, 2015 Board of Appeals Meeting

BOA 1501 SP VAR (2)

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**Admitted in MA and NH*

March 24, 2015

Westford Zoning Board of Appeals
55 Main Street
Westford, MA 01886

RE: BOA 1501 SP (2) Var (2)-20 Commerce way (also known as 540 Groton Road)
(Newport Materials LLC and 540 Groton Road)
Request for Reconsideration and Reopening of the public Hearing

Dear Members of the Board:

On March 18, 2015, your Board held a continued public hearing in order to consider the above referenced Special Permits and Variances on behalf of Newport Materials. It is the Applicant's position that the votes taken that evening were advisory in nature to allow staff to draft a decision for discussion purposes and not final votes of the Board. Our understanding is that the final votes will be taken at the next meeting of the Board.

It is also the Applicant's position that the actions taken by the Board at the hearing were a result of confusion, compounded by illegal interruptions and disruptive behavior by opponents of the project. For instance, during the Special Permit vote, after the vote to close the public hearing, Scott MacKay made a motion to approve, which was then disrupted by the Town Planner, Jeffrey Morrissette. Jeffery Morrissette stated that it was the staff's recommendation that final action not be taken until the decision be reduced to writing, the Chairman at that time, with the open motion on the floor, agreed to the position of the Town Planner stating that:

> "No matter what action we take tonight will not be finalized because I want it reduced in writing that the Board can review at our next month's meeting so finalization in the term final will not be until next month."

Mr. Hermann and Mr. Ennis then go on to discuss the procedure, and the Chairman's position that they are going to take a vote so that the staff can draft the decision in the affirmative or the negative. Mr. Ennis during the discussion states so this is a "vote to get to the vote". The Chairman and Jeffrey Morrissette go on to state that they would like the benefit of the draft decision, and Mr. Morrissette states that this would be the recommendation of the staff. The Board is then disrupted by a member of the public, who although is informed that the public hearing is closed and his statements would not be part of the public record, continued to make their statement which was followed by clapping by the general public. The motion is then seconded, then the Board proceeds to vote.

During the vote on the Variance for sound the public again disrupted the voting procedure. There was a motion on the floor, and before it was seconded, a member of the public again started speaking. This person continued to be disruptive while the language of the vote was being deliberated, and again, while there was motion on the floor. This person was not asked to leave the meeting although the Chairman did try to control her behavior. Furthermore, due to the fact that the public hearing was closed the Applicant was not given an opportunity to respond to her allegations. It is well established in Massachusetts that the open meeting law confers no right upon those in attendance to address the board in such a situation. *Yaro v. Bd. of Appeals of Newburyport*, 10 Mass. App. Ct. 587 (1980) (construing G.L. c. 39, § 23B).

For all the reasons stated herein it is the Applicant's request that the hearing be reopened and that a final vote on the above referenced Special Permits and Variances be taken at the next meeting of the Board. Furthermore, the Applicant would request that the hearing be held in a venue with proper space to accommodate the public and the Applicant. Also, the Applicant would request that in conformance with the Open Meeting law, should the public be unruly, especially where a public hearing has been closed, that the disruptive party be requested to leave the hearing.

Thank you for your time and consideration to this matter.

Sincerely,
Deschenes & Farrell, PC

Douglas C. Deschenes

Douglas C. Deschenes

DCD/cas

Message Fri, Mar 27, 2015 3:59 PM

From: Doug Deschenes <Doug@dfpclaw.com>

To: **Chris Kluchman**

Cc: Melissa Robbins` <Melissa@dfpclaw.com> jmorrissette@westfordma.gov "JSilverstein@k-plaw.com" <JSilverstein@k-plaw.com>

Subject: RE: Agenda for BOA meeting 3/31/15

Attachments: Attach0.html / Uploaded File 30K

Chris, Thank you....truly a tough time.[Marker]

With regard to the meeting next week and the timeline for the special permit. I am authorized to grant you an extension (and hereby do) to allow the decision on the special permit to be filed no later than one week after the April 15th meeting. This accomplishes a number of things. First, it will allow for a correct venue, the meeting room at the Town Hall is just not adequate, it made for a very hostile and difficult environment for not only my client but also the Board. And was certainly detrimental to the public who attended. Also, I am concerned that the legal capacity of that room and/hall way might be exceeded in which case we not only have a safety issue but also the FD could shut the meeting down wasting not only money but all of our time. It also provides both you and the Board, as well as my client adequate time to prepare for the meeting. I know we can all appreciate that.

Therefore, in granting the extension on the Special Permit we are also requesting that the meeting either be pushed to the April 15th meeting or to sometime later in April so that we have an adequate venue and everyone has time to adequately prepare.

Thank You.....Doug Deschenes

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March 30, 2015

Town of Westford
Planning Board
Town Offices
55 Main Street
Westford, MA 01886

Town of Westford
Zoning Board of Appeals
Town Offices
55 Main Street
Westford, MA 01886

RE: Application pursuant to Remand by Land Court in Newport Materials, et al v. Planning Board of Westford, et al., 10 Misc. 529867 (AHS)

Dear Members of the Planning Board and Zoning Board of Appeals:

The purpose of this letter is to set the record straight in advance of the next ZBA meeting, which the Town suddenly scheduled for tomorrow night, March 31, 2015, on only 48 hours' notice. This letter has been filed with the Town, and Newport requests that copies be provided to the individual ZBA members immediately in light of the highly unusual circumstances or, alternatively, that the meeting be postponed.

The Land Court issued a Decision dated December 8, 2014 concerning "the Project," which is an ***asphalt plant*** located on an approximately two acre parcel within a 115.52 acre lot at 540 Groton Road (the "Groton Parcel"). (Decision, pp. 6-8) A copy of the Decision is attached hereto as Exhibit 1.

The Court's Decision remanded the matter to the Planning Board "***for further proceedings consistent with [the] decision***." (Decision, p. 1, emphasis added)

In the Decision, the Court ***clearly articulated the path forward*** for the Parties (i.e., Newport ***and*** the Planning Board):

> "Plaintiff should resubmit to the Board a modified site plan review application ***(a) incorporating the sound attenuation barriers recommended by CTA, (b) provide that the Project will employ five or more employees, (c) requesting a variance to operate more than one principal use on the Groton Parcel, and (d) addressing the issue of the Project's power sources.*** Such a revised application must be also accompanied by

revised applications for MCP and WRPOD special permits." (Decision, p. 32, emphasis added)

"If so submitted, ***it would appear to this court that the Project would then be permitted as of right as a light manufacturing use at the Locus***, subject to such conditions as the Board may reasonably require in order to approve Newport's special permit applications." (Decision, p. 32, emphasis added; see also Decision, p. 20 and p. 29 fn.40)

The Court further stated that:

"In the interest of avoiding future litigation before this court, the Board's assessment of any such resubmitted plans shall be made in accordance with the findings and rulings contained in this decision. The parties are strongly encouraged to maintain an active and ***open dialog through the resubmission process*** in order to resolve any continuing dispute they have in such a way as to ensure that the Locus can be optimally used by the Plaintiffs while also accommodating any legitimate concerns Defendants may have as to the possible effects such uses(s) may have." (Decision, p. 32-33, emphasis added)

Newport has met its Court mandate and is entitled to approvals from the Planning Board and ZBA forthwith.

(a) **Sound Attenuation Barriers** (relevant to whether the Project is "quiet machinery" within the definition of a by-right Light Manufacturing use)

Based on evidence from the ***Planning Board's sound expert***, the Court found that expected sound from the Project ***complied*** with the only sound limits in Westford Zoning Bylaws (the "Bylaws") and in the DEP Regulations (i.e., below 70 dBA (total sound) or 10 dBA above ambient) at the north, south and east boundaries as well as at the nearest residential receptors (1400' to 4000'+ away) ***without*** a sound barrier. (Decision, pp. 28-29)[1]

The Court determined that the ***only*** issue concerning sound was at the western boundary. (Decision, p. 28) The Fletcher Quarry, which is a 100 year old, 300+ foot deep open rock quarry, is located on the 163 acre lot adjacent to the Groton Parcel to the west. (Decision, p. 7) The owner of the quarry, John MacLellan III, has submitted a letter to this Board stating that he has "***no issues with the proposed Project.*** Furthermore, I have ***no issues with the potential sound that the Project may create. I support the granting of the requested permits including, the waiver of the sound attenuation barrier*** along my property line." (MacLellan ltr. dated 1/13/15, emphasis added) A copy of Mr. MacLellan's letter is attached hereto as Exhibit 2.

[1] These parameters are set forth in the MCP Bylaw and DEP Sound Regulations. (Decision, pp. 25-26). Since "quiet machinery" ***is not*** specifically defined in the Bylaw, the Court found that compliance with these parameters constitutes "quiet" machinery. (Decision, p. 26).

Notwithstanding that the ***direct abutter at the relevant location supports*** the Project and ***does not*** want a sound barrier, if the Planning Board insists, Newport will install one. The Court commented that "[p]laintiff has signaled a willingness to agree to build noise attenuation barriers…which would appear to be a ***perfectly reasonably way to accommodate Defendants' concerns.***" (Decision, p. 33 fn.45, emphasis added)

Newport has submitted to the Planning Board documentation from its sound expert (CTA) which identifies sound attenuation barriers and related mechanisms that will reduce sound from the Project at the western boundary to ***below*** 70 dBA (total sound) and 10 dBA above ambient (here 53 dBA). (CTA/Konning ltr. dated March 10, 2015) A copy of CTA/Konning's letter with exhibits is attached hereto as Exhibit 3. Specifically, CTA/Konning conclude:

> "All sound produced simultaneously from all asphalt plant sound sources operating during full plant operations at all elevations above grade would result in sound levels of **less than 53 dBA** at all locations along the Newport Materials western property line, and at all locations at all elevations on the Fletcher Quarry industrial rock quarry property…."
>
> "The CTA refined noise control design response in accordance with the Peer Reviewer request has resulted in current projections of sound levels that are lower (better) than previous projections, and which indicate acoustical compliance with the most-stringent applicable acoustical criteria of the Town of Westford, at the compliance location stipulated in the Land Court Decision (and beyond)." (Exhibit 3, p. 7)

Newport has complied with requirement (a) of the Decision.

(b) **5 (or more) Employees** (relevant to whether the Project is a by-right Light Manufacturing use under the Table of Uses)

The Court characterized the 5 (or more) employee requirement in order to qualify as a by-right Light Manufacturing use under the Table of Uses as "***nonsensical***[]." (Decision, p. 23 fn.31, emphasis added) The Court stated that it "can think of ***no reason*** why a zoning ordinance would permit large-scale manufacturing operations but forbid small-scale manufacturing operations." (Id., emphasis added) The Court also stated that "Newport ***can easily remedy*** this defect on remand to the Board by simply revising the site plans for the Project so that five or more employees will be employed." (Id., emphasis added)

Consistent with the Court's Decision, Newport's principal, Rick DeFelice, has submitted an affidavit dated January 30, 2015 to the Planning Board wherein he commits to employ 5 or more individuals on the Project and he describes their respective roles. (DeFelice aff. pars. 3-4) A copy of Mr. DeFelice's affidavit is attached hereto as Exhibit 4.

Newport has complied with requirement (b) of the Decision.

(c) Requesting a Variance to Operate More Than One Principal Use on the Property (relevant to Bylaw 3.1.1)

The Court opined that "the Project would be an ideal use of the Locus [i.e., the 2 acre parcel within the nearly 116 acre Groton Parcel], given its proximity to the Fletcher Quarry and Newport's rock crushing facility, and ***based on the overall industrial nature of the area."*** (Decision, p. 33 fn. 45) In addition, the Court concluded that "all that is needed to conduct multiple primary uses is a ***simple variance"*** (Decision, p. 11 fn. 13) "which, the court expects, given the multiple uses already being conducted at the Groton Parcel, ***would be routinely granted."*** (Decision, p. 29 fn.40).

In accordance with the Court's Decision (as revised), on January 5, 2015 Newport applied to the ZBA for permission to operate multiple uses on the site. The basis for allowing multiple uses (in addition to the Court's statements above) are set forth in a letter from Newport's land use counsel to the ZBA, a copy of which is attached hereto (without exhibits) as Exhibit 5. A final decision from the ZBA is pending.

Newport has complied with requirement (c) of the Decision.

(d) Project's Power Sources (relevant to whether the Project is within the definition of a by-right Light Manufacturing use)

The Court determined that the Project must be either (a) electric powered; ***or*** (b) powered by "other substantially noiseless and inoffensive motor power" under the Bylaw definition of Light Manufacturing (Decision, p. 24). The Court stated that "it appears that the majority of the equipment sought to be installed will be powered substantially (if not entirely) by electrical means. At first blush, then, ***it would appear likely that this requirement will be satisfied by the Project.***" (Decision, pp. 24-25)

Consistent with the Court's Decision, Newport has submitted a letter and an affidavit dated January 28, 2015 from the manufacturer of the asphalt plant, Gencor Industries, specifying that the Project will be electric powered. A copy of the letter and affidavit are attached hereto as Exhibit 6.

Newport has complied with requirement (d) of the Decision.

Revised MCP and WRPOD Applications

Per the Court's Decision, Newport submitted revised MCP and WRPOD materials to the Planning Board. Regarding these permits:

- Any concerns raised regarding traffic have been ***addressed and resolved*** as indicated in the submission by Newport's traffic expert, Jeffrey Dirk of Vanasse and Associates, Inc., dated February 2015. A copy of Mr. Dirk's report is attached hereto as Exhibit 7. The Planning Board's traffic consultant, Robert Michaud of MDM Transportation Consultants in a letter dated March 11, 2015, concurred. A copy of Mr. Michaud's letter is attached hereto as Exhibit 8.

- Any concerns regarding public health were resolved ***before*** trial. Specifically, "[h]ealth, safety or welfare" issues ***were waived*** by the Planning Board at trial. The Court repeatedly cited to, and relied, on this waiver in its Decision. (See, e.g, Decision, p. 9 fn. 9 "[t]he remainder of this provision sets forth an additional restriction prohibiting uses that are detrimental to health or safety (the "Prohibition Clause"). The parties have stipulated that the ***Project is not in violation of the Prohibition Clause***"; see also, Decision, p. 12 and p. 22 "the parties have agreed that the Project would not violate the Prohibition Clause").

- Any concerns regarding noise have been ***resolved*** as set forth above.

- Any other issues (e.g., lighting, landscaping, stormwater etc.) have been addressed and/or can be made conditions of the permit(s) per the Court's Decision: "[a]ny other issues as to compliance with the letter of the Bylaw would seem to be ***minor issues*** . . . ." (Decision p. 33 fn.45)

- Finally, the issues in Staff Notes dated January 17, 2015 and March 13, 2015 have been addressed by Newport during this Remand process, including through Newport's counsel's last submission on March 27, 2015.

Newport has complied with all components of the Decision (and the Bylaws) and is entitled to approval of its permits from the Planning Board and variance(s) from the Zoning Board forthwith.

Sincerely,

Thomas F. Reilly

TFR/aaa
#1394202v2

cc: Jonathan Silverstein, Esq. (via e-mail)

SEAL)

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
10 MISC 429867 (AHS)

NEWPORT MATERIALS, LLC, and 540 GROTON ROAD, LLC,
Plaintiffs,
vs.

MICHAEL GREEN, ANDREA PERANER SWEET, FREDERICK PALMER, DENNIS GALVIN and KEVIN BORSELLI, in their capacity as members of the PLANNING BOARD OF THE TOWN OF WESTFORD, and not individually, and the TOWN OF WESTFORD,
Defendants.

DECISION

This case involves a dispute between plaintiffs Newport Materials, LLC ("Newport") and 540 Groton Road, LLC ("Groton") (together, "Plaintiffs") and defendants Members of the Planning Board of the Town of Westford (the "Board") and the Town of Westford ("Westford" or the "Town") (together, "Defendants") regarding the Board's denial of Newport's applications for approval of a plan to develop an asphalt manufacturing facility on industrial property owned by Groton and leased to Newport. The issues in this case have been extensively briefed by the parties, both pre- and post-trial, and the court has had the benefit of expert testimony submitted by both parties. After considering the evidence adduced at trial, as well as the filings of the parties, it is the decision of this court that the Board's denials of Plaintiffs' applications are upheld -- albeit for reasons different than those stated in said denial decisions -- and the matter is remanded to the Board for further proceedings consistent with this decision.

Procedural History

Plaintiffs filed their unverified complaint on May 18, 2010, by which they (a) appealed, pursuant to G. L. c. 40A, § 17, the decision of the Board to deny two special permits and a site plan review in connection with Newport's proposed development of an asphalt manufacturing facility (the

"Project") at Locus (defined below);[1] (b) sought a judicial determination, pursuant to G. L. c. 240, § 14A, with respect to certain provisions of the Town of Westford Zoning Bylaw (the "Bylaw") relative to the definitions of "light manufacturing" uses and MCPs; and (c) sought a declaratory judgment, pursuant to G. L. c. 231A, as to whether the Project constituted a "light manufacturing" use and/or an MCP.[2] A case management conference was held on June 30, 2010. Defendants filed their Answer to First Amended Complaint on July 13, 2010. On July 29, 2010, would-be intervenors Michael Donnelly, Marie Burnham and John Pecora filed a motion to intervene in this case, which was denied by Order dated August 12, 2010.

Plaintiffs filed their Motion for Partial Summary Judgment on September 13, 2010, together with a supporting memorandum, a statement of material facts, and appendices containing Affidavits of Marc J. Goldstein, Esq., Brian C. Levey, Esq., Douglas C. Deschenes, Esq., Christopher M. Lorrain, P.E., and Richard A. DeFelice (Newport's principal). On October 28, 2010, Defendants filed their opposition to Plaintiff's summary judgment motion, together with a supporting memorandum, a statement of additional facts, and an appendix, which contained Affidavits of Robert J. Michaud, P.E., and Matthew Hakala (the Town's Building Commissioner). Plaintiffs filed their reply brief on November 8, 2010, together with Affidavits of James E. Winn, P.E., John G. MacLellan III (the principal of an abutter to Newport), and a Supplemental Affidavit of Richard A. DeFelice.

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[1] Specifically, on April 20, 2010, the Board issued decisions denying Newport's proposed site plan for the Project (the "Site Plan Review Decision"), Newport's application for a major commercial project ("MCP") special permit, and Newport's application for a Water Resource Protection Overlay District ("WRPOD") special permit.

[2] Plaintiffs filed their First Amended Complaint on June 16, 2010. Pursuant thereto, Plaintiff's Count IV was amended to include "[t]he LLC is entitled to a determination of the validity of §§ 9.3A, 10.2 and Appendix A, Table of Principal Use Regulations of the Bylaw, and/or the extent to which §§ 9.3A, 10.2 and Appendix A, Table of Principal Use Regulations of the Bylaw, affect the Project; to wit, the requirement of these provisions of the Bylaw that all commercial or industrial uses permitted by-right obtain a MCP Special Permit is invalid and/or the Project does not require a MCP Special Permit." Count V was amended to include "[a]n actual controversy exists between Newport and the Planning Board regarding whether §§ 9.3A, 10.2 and Appendix A, Table of Principal Use Regulations of the Bylaw are lawful and/or Newport is required to seek and obtain a MCP Special Permit for the Project. Newport contends that the requirement of these provisions of the Bylaw that all commercial or industrial uses permitted by-right obtain a MCP Special Permit is unlawful and/or the Project does not require a MCP Special Permit and the Planning Board disagrees."

Also on November 8, 2010, Plaintiffs filed a motion to strike portions of the Affidavit of Robert J. Michaud, P.E. On November 30, 2010, Defendants filed their opposition to this motion to strike, as well as a supplemental memorandum in opposition to Plaintiff's summary judgment motion and Supplemental Affidavit of Robert J. Michaud, P.E.

A hearing on both motions was held on December 1, 2010, and the matters were taken under advisement. On December 10, 2010, Plaintiffs filed a reply to Defendants' November 8, 2010 supplemental submissions, together with a second supplemental Affidavit of Richard A. DeFelice. Subsequently, both parties filed a number of letters (on December 13 and 22, 2010, and on January 3, 2011) with this court, by which they attempted to clarify their supplemental submissions.

On August 15, 2011, the court issued a decision on Plaintiffs' motion for summary judgment ("Land Court Decision 1"), (a) finding that the Board had the authority to determine whether the proposed use of Locus (defined below) was an as of right use, (b) finding that G. L. c. 40A, § 4 invalidated Section 10.2 of the Bylaw (pertaining to special permits for MCPs), (c) remanding to the Board the issue of whether the Board properly denied Newport's WRPOD special permit application, and (d) attempting to clarify the issue of whether the Project was a "light manufacturing" use.[3]

Following Land Court Decision 1, on October 14, 2011, the parties filed a joint stipulation, in which they stipulated (a) that only Section 10.2(d) of the Bylaw (defining MCPs) was invalidated, (b) that no issues would be remanded to the Board at that time, and (c) that Plaintiffs would be allowed to file a second amendment to their complaint.[4]

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[3] The court's decision did not remand the Board's denial of Newport's MCP special permit application because it invalidated Section 10.2 of the Bylaw (pertaining to the definition of MCPs), and therefore found it unnecessary to determine the merits of that denial.

[4] Specifically, Paragraph 3 of the parties' joint stipulation stated:

> The parties stipulate and agree that in light of the Court's Rule 56 Decision there is no need to remand to the Westford Planning Board any of its decisions regarding Newport Materials on either Site Plan Review, WRPOD Special Permit or MCP Special Permit and the case should proceed to discovery and trial provided, however, that

Plaintiffs filed their Second Amended Complaint on October 14, 2011, in which they (a) argued that the Project (in addition to qualifying as an of right "light manufacturing" use) also qualified under Section 10.2 of the Bylaw as "quarrying [and] mining", (b) challenged the validity of a portion of the Bylaw's definition of "light manufacturing" and the construction of that definition, and (c) contested the validity of the thresholds use in the Bylaw to trigger the requirement to apply for an MCP special permit. The parties thereafter filed a Stipulation of Dismissal of Counts VI and VII of the Second Amended Complaint (dealing with the "light manufacturing" definition's Prohibition Clause -- defined below) on November 13, 2012.[5] On November 30, 2011, Defendants filed their Answer to Second Amended Complaint.

At a status conference held on January 25, 2013, the parties could not resolve their differences as to whether a trial or summary judgment hearing was necessary to resolve the remaining issues. Defendants filed a motion for summary judgment on April 22, 2013, together with a supporting memorandum, statement of material facts, and the Affidavit of Dr. K. Wayne Lee, P.E. On May 2, 2013, Defendants filed the Affidavit of Robert J. Michaud, P.E. On May 17, 2013, Plaintiffs filed their opposition to Defendants' motion for summary judgment, together with a supporting memorandum, statement of additional facts, and an appendix. At a status conference on May 28, 2013, the court determined that a trial would be necessary, since many facts remained in dispute. As such, in anticipation of trial, the parties filed a joint pre-trial memorandum dated August

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a. No party is agreeing in advance to the scope or extent of discovery.
b. No party is foreclosed from filing a dispositive motion at any point with respect to the Second Amended Complaint except as may be limited by the Court . . . ; and
c. No party is waiving any argument that it may have with respect to the appropriate remedy in the event the court overturns any portion of any of the Planning Board's decisions.

[5] Counts VI and VII had requested a judicial determination and declaratory judgment that the Prohibition Clause (defined below) -- which prohibited "any light manufacturing business, the conduct of which may be detrimental to the health, safety or welfare of persons working in or living near the proposed location of such manufacturing, including, without limiting the generality of the foregoing, special danger of fire or explosion, pollution of waterways, corrosive or toxic fumes, gas, smoke, soot, dust or foul odors and offensive noise and vibrations" – was void for vagueness or otherwise unsupported by any rational basis, and should be invalidated.

23, 2013, in which they reached an agreement as to some of the disputed facts, and agreed to the dismissal of Counts XII and XIII of Plaintiff's Second Amended Complaint, which had attacked the validity of section 10.2 of the Bylaw defining MCP special permit thresholds.[6]

A pre-trial conference was held on August 27, 2013. On October 17, 2013, Plaintiffs filed their Omnibus Motion in Limine and Defendants filed four motions in limine. A hearing on all motions in limine was held on October 24, 2013, on which date the court denied Defendants' Motion in Limine to Exclude Testimony and Evidence Pertaining to the Off-site Measurement of Sound, denied Defendants' Motion in Limine to Exclude Non-binding Unenforceable Stipulations, and allowed Defendants' Motion in Limine to Exclude All Evidence Concerning the Concrete Plant

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[6] Following the parties' October 14, 2011 joint stipulation and their pre-trial memorandum, the following is the status of the Counts in Plaintiff's Second Amended Complaint:

- Count I: Appeal of Decisions (G.L. c. 40A, §17) (The Board's denials "exceeded the authority of the [Board] and were arbitrary and capricious and [sic] legally untenable.")
- Count II: Petition for Judicial Determination (G.L. c. 240, § 14A) (Plaintiffs are entitled to a "determination of . . . whether the Project is a 'Light Manufacturing' use allowed by right in the IA zoning district.")
- Count III: Declaratory Judgment (G. L. c. 231A, §§ 1-2) ("[T]he Project is a Light Manufacturing use under the Bylaw.")
- Count IV: Petition for Judicial Determination (G.L. c. 240, § 14A) (Plaintiffs are entitled to a "determination of . . . whether the Project is a '[q]uarrying [and] mining' use allowed by right in the IA zoning district.")
- Count V: Declaratory Judgment (G. L. c. 231A, §§ 1-2) ("[T]he Project is a "[q]uarrying [and] mining' ('the extraction of rock and the processing and finishing of the product hereof, rock crushing, lime kilns, lumbering') use under the Bylaw.")
- Count VI: Voluntarily dismissed
- Count VII: Voluntarily dismissed
- Count VIII: Petition for Judicial Determination (G.L. c. 240, § 14A) (Plaintiffs are entitled to a "determination of . . . whether the Prohibition Clause must be interpreted reasonably and in such a way that an applicant can understand its meaning including, but not limited to, reliance on recognized industry or regulatory standards.")
- Count IX: Declaratory Judgment (G. L. c. 231A, §§ 1-2) ("[T]he Light Manufacturing definition must be interpreted reasonably and in such a way that an applicant can understand its meaning including, but not limited to, reliance on recognized industry or regulatory standards.")
- Count X: Petition for Judicial Determination (G.L. c. 240, § 14A) (Plaintiffs are entitled to a "determination of [whether] the Project does not require a MCP Special Permit.")
- Count XI: Declaratory Judgment (G. L. c. 231A, §§ 1-2) ("[T]he Project does not require a MCP Special Permit.")
- Count XII: Voluntarily dismissed
- Count XIII: Voluntarily dismissed

Notably, Count VIII refers to "the Prohibition Clause". It appears that the intended reference here was actually the Bylaw's definition of "light manufacturing". The court interprets Count VIII as such for purposes of this Decision.

Located at 520 Groton Road.[7]

A site view and trial were held on November 4-6, 2013; the first day of trial was held at Middlesex County Superior Court in Woburn, Massachusetts, and the second and third days at the Land Court in Boston. Testimony at trial for Plaintiffs was given by Richard DeFelice (Newport's principal), Christopher M. Lorrain (civil engineer), John G. MacLellan, III (principal of the company that owns the Fletcher Quarry, defined below), Brion Koning (acoustic consultant), and James D. Fitzgerald (traffic engineer). Testimony for Defendants was given by Caroline I. Kluchman (the Town's Director of Land Use Management), James D. Barnes (civil engineer) and Robert J. Michaud (transportation engineer).[8] Sixty-five agreed-upon exhibits were submitted into evidence.

Post-trial briefs were filed on February 21, 2014, and Plaintiffs filed a supplemental post-trial brief in response to Defendants post-trial brief on March 24, 2014. Also on February 21, 2014, Defendants moved to strike portions of the Affidavit of Denis R. J. Roy ("Roy") and the exhibits annexed thereto. This motion is decided below.

Based on the pleadings, the evidence submitted at trial, the parties' pre- and post-trial filings, as well as the reasonable inferences drawn therefrom, I make the following findings of fact.

The Properties at Issue

1. Groton is the owner of a 115.52 acre parcel located at 540 Groton Road (the "Groton Parcel") located near the northeast corner of Westford, Massachusetts. The Groton Parcel is irregularly-shaped (resembling, roughly, a backwards C-shape wrapping around its neighbor to the

[7] The court declined to rule on Defendants' Motion in Limine to Exclude Evidence or Argument Pertaining to the Planning Board Public Hearing Process, opting instead to make individual rulings at trial on the evidentiary issues implicated by that motion, based upon the parties' objections related to relevance and/or hearsay. The court, in general, excluded evidence relating to the public hearing process before the Board, except where such information was helpful in providing insight as to the background of the Project.

[8] The parties agreed to submit affidavits and deposition transcripts for expert witnesses Denis R. J. Roy (engineer), Kang-Won Wayne Lee (civil and environmental engineer), and Terry S. Szold (professor of urban studies and planning) in lieu of taking their testimony at trial.

west), and is bounded by Route 40 to the south, an operating quarry to the west, an industrial lot and Route 3 to the east, and vacant industrial land to the north. The eastern side of the Groton Parcel extends into the adjacent town of Chelmsford.

2. No land used for residential purposes directly abuts the Groton Parcel. Abutting the Groton Parcel to the west is a 163 acre property located at 534 Groton Road, which is the site of the Fletcher Quarry, a 300+ foot deep open rock quarry that is over 100 years old (the "Fletcher Quarry"). Current uses of the Groton Parcel include a large solar electric generation facility, an office building, a rock-crushing facility, and the storage of granite materials.

3. Newport is the lessee of approximately eight acres of the Groton Parcel (the "Newport Parcel"). The Newport Parcel is located near the middle of the Groton Parcel at its westerly boundary, directly abutting the Fletcher Quarry. Newport currently operates the above-noted rock-crushing facility on the Newport Parcel under a special permit to operate as a pre-existing non-conforming use, subject to certain conditions relating to traffic and hours of operation.

The Project

4. The Project is a proposed asphalt (also known as "bituminous concrete") plant to be located on an approximately two acre portion of the Newport Parcel ("Locus"), which would involve the installation and operation of an outdoors "skidded ultraplant" comprised of various industrial equipment, including a hot mix asphalt drum, a #2 fuel oil storage tank, a hot oil heater, various storage tanks and silos, a sixty-eight foot venting stack, conveyers, a process control center, and a materials processing yard. The Project would employ up to three employees and is intended to operate as a single shift operation running from 6:00 A.M. to 7:00 P.M., Monday through Saturday, with operations closed between December 15 and March 15 of each year. As proposed, the maximum potential production capacity of the Project would be 400 tons of finished asphalt per

hour, and 5,000 tons per diem; however, per the Massachusetts Department of Environmental Protection ("MassDEP") permit approval for the Project, output is limited to 60,000 tons per month and 300,000 tons per annum.

5. Materials needed for the Project to produce asphalt include aggregate (i.e., minerals, such as rock, gravel, and sand) and liquid bitumen, which are mixed to create asphalt (i.e., bituminous concrete). This mixture can be supplemented with crushed recycled asphalt product ("RAP"), which, pursuant to the MassDEP permit, can constitute up to 40% of the final product. Plaintiffs intend to obtain 50% or more of the needed aggregate from the adjacent Fletcher Quarry (via non-public roads between Locus and the Fletcher Quarry), but is under no contractual obligation to do so; the balance of the aggregate would come from off-site sources. Any RAP used would come from off-site.

6. Briefly stated, the proposed process for the production of the bituminous concrete at the Project is as follows: first, the necessary materials would be transported to the Project by truck; next, aggregate stored in bins would be deposited by conveyers into a mixer to be dried, heated, and then mixed with recycled dust and RAP; finally, liquid bitumen would be added to create the final product (bituminous concrete), which would be transported by conveyers into holding tanks for storage until dispensed into heavy-duty trucks for off-site distribution.

Relevant Zoning Regulations

7. Section 1.3 of the Bylaw states that the purpose of the Bylaw is:

> to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the

> prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the town, including consideration of the recommendations of the most recent Master Plan adopted by the Planning Board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill said objectives.

8. Section 9.3A.1(2) of the Bylaw provides, specifically with respect to noise (in the context of MCPs), that the goal of regulating the sound that a proposed use would generate is to "reduce noise pollution in order to preserve and enhance the natural and aesthetic qualities of the Town; preserve property values; and preserve neighborhood character." Section 9.3A.4(2)(A) -- which establishes performance standards for MCPs -- specifically provides that such sound should be "measured at the property boundary of the receiving land use."

9. Pursuant to Appendix A of the Bylaw, Locus is located in an Industrial A ("IA") zoning district, in which "quarrying [and] mining" and "light manufacturing" (among other uses not relevant to this case) are allowed as of right. Section 10.2 of the Bylaw defines "quarrying [and] mining" as "the extraction of rock and the processing and finishing of the products hereof, rock crushing, lime kilns, [and] lumbering." "[L]ight manufacturing" is defined as: "fabrication, assembly, processing or packaging operations employing only electric or other substantially noiseless and inoffensive motor power, utilizing hand labor or quiet machinery and process . . . ."[9] [10]An exception to the rule that light manufacturing is permitted of right in an IA zoning district is if the

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[9] The remainder of this provision sets forth an additional restriction prohibiting uses that are detrimental to health or safety (the "Prohibition Clause"). The parties have stipulated that the Project is not in violation of the Prohibition Clause.

[10] In order to analyze this provision, some of the terms contained therein must be defined. "Processing" is defined as "1. A series of actions, changes, or functions bringing about a result. . . . 2. A series of operations performed in the making or treatment of a product . . . ." AM. HERITAGE DICTIONARY (5th Ed. 2014) (*available at* http://ahdictionary.com). Defendants' expert, Terry Szold, seemed to concede, in his testimony, that the Project would satisfy this definition. "Substantial" is defined as "[c]onsiderable in importance, value, degree, amount, or extent". Id. "Noiseless" is defined as "[h]aving or making no noise". Id. "Inoffensive" is defined as "[ ] Giving no offense; unobjectionable. [ ] Causing no harm; harmless." Id. "Inoffensive" is defined as "[ ] Giving no offense; unobjectionable. [ ] Causing no harm; harmless." Id. "Quiet" is defined as "[m]aking or characterized by little or no noise". Id. "Noise" is defined as "[s]ound or a sound that is loud, unpleasant, unexpected, or undesired". Id.

operation employs "not more than four employees", in which case it would be prohibited.

10. For certain larger-scale commercial operations deemed to be MCPs, Section 9.3A of the Bylaw requires that a special permit be obtained; this requirement applies even if the use would otherwise be allowed of right in the relevant district. The purpose of this requirement is to protect surrounding properties from undesired or offensive effects of a proposed commercial operation (such as noise, odors, light, and traffic). Section 10.2 of the Bylaw defines a MCP as:

> any industrial or commercial use which has one or more of the following characteristics: (a) 15,000 square feet or more of gross floor area in any building or combination of buildings; (b) more than 100 required parking spaces; (c) generation of more than 250 vehicle trips per day, as determined by the ITE's Trip Generation Manual; (d) the use is allowed in the district in which it will be located.[11]

11. With respect to MCPs, Section 9.3A.4(2) of Bylaw states that "[n]o person shall operate or cause to be operated any source of sound in a manner that creates a sound level which exceeds 70 dBA or 10 dBA above ambient, whichever is lower, when measured at the property boundary of the receiving land use."[12] However, pursuant to Section 9.3A.6 of the Bylaw, "[t]he Planning Board may . . . waive any of these performance standards where such waiver is not inconsistent with the public health and safety, and where such waiver does not undermine the purposes of this section and the proposed development will serve the goals and objectives set forth in Section 9.3A.1."

12. Under Section 8.0 of the Bylaw, certain areas of the Town designated as WRPODs (including the area where Locus is situated) are subject to special restrictions related to protecting

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[11] As noted above, the parties have stipulated that requirement (d) of Section 10.2 is invalid.

[12] This 10 dBA above ambient standard (measured at property lines and nearby residences and/or other sensitive receptors, such as schools or hospitals) is echoed in MassDEP noise regulations. However, "[n]oise levels that exceed the criteria at the source's property line do not necessarily result in a violation or a condition of air pollution . . . ." Thus, "[a] new noise source that would be located in an area that is not likely to be developed for residential use . . . or in a commercial or industrial area with no sensitive receptors may not be required to mitigate its noise impact . . . ."

the Town's supply of drinking water. Of relevance to the Project is Section 8.1.10 of the Bylaw, which requires a special permit for any use involving storage of fuel oil in a WRPOD, which was a proposed part of the Project.

13. Finally, pursuant to Section 3.1.1 of the Bylaw, "[n]ot more than one principal use or structure shall be allowed on any lot, except as otherwise may be provided herein." However, Section 9.3.1 of the Bylaw provides that a special permit for a variance from this restriction may be granted if "the proposed use or structure(s) shall [sic] not cause substantial detriment to the neighborhood or the town, taking into account the characteristics of the site and of the proposal in relation to that site."[13]

The Permit Application Process

14. In April of 2009, Newport filed applications with the Board for a site plan review and MCP and WRPOD special permits for the Project.[14] Between May of 2009 and April of 2010, the Board held twenty-one public hearings with respect to the Project, during which period Newport supplemented their filings to address the Board's concerns and requests for information. On April 20, 2010, the Board voted 4-1 to deny all three applications, primarily because "the Board [lacked] jurisdiction to approve the Site Plan based on a finding that the [Project] is not light manufacturing as defined in the [Bylaw] and the application therefore has no standing."

15. In the Site Plan Review Decision, the Board determined that the Project did not

[13] Defendants argue that Section 3.1 of the Bylaw entails that a MCP special permit is required in order to operate multiple principal uses and/or structures on a single lot. On the way to this conclusion, Defendants appear to misconstrue Section 3.1.3 as creating a new use category for MCPs that is distinct from "primary uses". This construal is without support in any aspect of the Bylaw. Section 3.1.3 simply entails that a use that is characterizable as falling under multiple different use classifications is subject to the strictest permitting requirements applicable to any of the different classifications of which it is susceptible. Moreover, nowhere in the Bylaw's definition or discussion of MCPs is it stated (or even implied) that multiple primary uses on a single lot requires a MCP special permit. Rather, it would appear that all that is needed to conduct multiple primary uses is a simple variance. In this way the Board retains an inherent discretion to vary from its zoning ordinances.

[14] Around this time, Newport also applied for a plan approval from MassDEP, which was conditionally granted in September of 2009; a final modified conditional approval issued on April 7, 2011.

constitute light manufacturing because it would not be "'substantially noiseless and/or inoffensive' as is required for the use to be 'Light Manufacturing'".[15] Specifically, the Site Plan Review Decision stated that Plaintiffs' sound level evaluation report "did not take into account noise generated from the proposed truck traffic", "did not provide sound level data from the nearest abutting property boundaries as required by the MassDEP", did not include the impact of proposed "on-site heavy operating equipment", and improperly incorporated unfounded noise attenuation data.[16] The Site Plan Review Decision further stated that the Project would be in violation of the Prohibition Clause (a claim that has since been withdrawn by agreement of the parties), that the Project would result in an unacceptable impact on local traffic, and that the Project would constitute "Heavy Manufacturing". The Site Plan Review Decision made no reference to the Bylaw's prohibition of light manufacturing operations employing "not more than four employees" in IA zoning districts.

Noise Data

16. Plaintiffs and Defendants each submitted expert evidence pertaining to the projected noise impact that the Project would have.[17] According to the parties' experts, in order to determine

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[15] As discussed below, it is the determination of the court that the "substantially noiseless and inoffensive" requirement applies only to the power source of a proposed use. Neither party offered testimony specifically addressing the means by which the Project would be powered, nor as to the level of noise that any non-electrical motor power would generate. Both at trial and in their post-trial briefs, the parties focused not on determining whether the Project's power source would be "substantially noiseless and inoffensive", but rather whether the Project's operations generally could be described as such. Based upon the Project plans, it appears that the majority of the equipment sought to be installed may be powered substantially (if not entirely) by electrical means, including, specifically, the conveyer belts, the materials recycler, the motor control center, the HVAC system, the exhaust system, and the fuel pump systems. The only systems that appear to generate power through non-electrical means are the gas and oil burners used to heat materials, and, with the exception of the (electrical) support components of these burners, there is no indication that the burners themselves are motorized. With specific respect to the asphalt heating systems, according to the Project plans, these systems are "designed to overcome . . . high noise levels associated with open air burners."

[16] Plaintiffs' sound level evaluation was conducted by Cavanaugh Tocci Associates, Inc. ("CTA"), and it included sound measurements at various residential and commercial receptors outside of the Groton Parcel; CTA's report, which was submitted to the Board as part of Newport's application for approval of the Project, is dated May 14, 2009, and was supplemented by three additional reports. CTA also submitted their findings to Mass DEP in connection with their application for a non-major comprehensive plan approval, which was eventually approved.

[17] Because of the technical nature of noise impact assessment, a brief precis on the basic concepts underlying same is appropriate. According to the parties' expert witnesses, sound can be evaluated in terms of its power (i.e., a quantification of the amount of sonic energy produced by a noise source) or its pressure (i.e., the amount of sound perceived by a

the sound impact that a potential noise source will have, ambient sound level (i.e., a measurement of background sound levels without the potential noise source) is compared to the total future sound level (i.e., the projected noise level expected to be generated by the source plus the ambient sound level) at one or more measurement locations (referred to as "receptors").[18] Projections as to the expected future noise a proposed use would make are typically made by reference to actual measurements of similar uses in other locations. The experts testified that such an evaluation must also take into consideration unique features of the property in question that may result in sound attenuation (i.e., reduction), which can be caused by various sources, including air molecules (which results in the reduction of distant sounds, especially high frequency sounds), foliage, and any solid barriers between the noise source and the measurement site.

17. Because the level of noise fluctuates over time, the experts testified that sound measurements in any noise impact study must be taken for a sustained period of time. After so doing,

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listener). Since sound power is an "abstract" concept that is "impossible to measure" and does not pertain to sound perception, sound pressure is used to evaluate sound for noise analyses.

The unit by which sound pressure is most commonly evaluated is decibels A-weighted (dBA), the technical definition of which is "[t]he total sound level in decibels of all sound as measured with a sound level meter with a reference pressure of 20 micropascals using the 'A' weighted network scale at slow response." A PLANNER'S DICTIONARY (Michael Davidson & Fay Dolnick, Am. Planning Ass'n eds., 2004), p. 282 (*found at* Aff't of Terry S. Szold, Ex. B). Here, "A-weighting" refers to an emphasis of middle frequency sounds (and deemphasis of lower and higher frequency sounds), which is intended to represent how the human ear perceives sound at various frequencies.

The parties' expert witnesses agreed that increases in sound of 3 dBA are barely perceptible, increases of 5 dBA are noticeable, and increases of 10 dBA are perceived as roughly double in volume. See MS&G Lakeville Corp. v. Town of Lakeville, 2007 WL 1576141 (Mass. Land Ct. June 1, 2007).

The parties' expert witnesses also agreed that the human ear is sensitive to a broad band of frequencies of sound ranging from low frequency sounds (i.e., bass sounds) to middle frequency sounds (e.g., normal speech) to high frequency sounds (i.e., high pitch sounds, such as birds chirping). Defendants' expert witness plausibly testified that sounds at different frequencies have a different perceived character effect on the listener, so a noise source that does not substantially affect the total sound level could nonetheless be perceived as noticeably different from the ambient sound level if the noise was of a different sound frequency. However, Plaintiffs' expert witness testified that such a difference occurs only if the added sound is "significantly tonal", such as a siren or alarm.

[18] Plaintiffs' expert witness described the ambient sound level as "the relatively steady state sound level that exists in an environment . . . [or] the residual sound level that is near the minimum sound level that occurs during a particular time interval." The projected sound level of a proposed use is estimated using industry standards for sound generation from similar uses and applying sound attenuation based on the location of the measurement relative to the location of the project. Calculating the total sound level is not a matter of simply adding the dBA levels of the ambient sound and the estimated sound of the proposed use, but rather involves a "logarithmic addition" of the two sounds; as such, the total sound level may not be higher than the sound level of whichever sound was more dominant.

the level of the sound is deemed to be the level it was at (or above) 90% of the time, which is referred to as the "L90" standard. Notably, this court has previously found the L90 standard to be an acceptable standard for noise measurement, and it is also employed in MassDEP regulations. See MS&G Lakeville Corp., 2007 WL 1576141 at 5, n. 24. Plaintiffs' and Defendants' respective sound analysis experts each employed this method in their analyses.

18. The noise impact study conducted by Plaintiffs' sound experts, CTA, measured sound levels at seven residential receptors and one commercial receptor outside of the Groton Parcel.[19] CTA's findings were as follows:

TABLE 1: CTA NOISE IMPACT ESTIMATES AT NEARBY RECEPTORS

Receptor Location	Ambient Sound Level	Total Future Sound Level	Increase
263 Groton Road	43 dBA	45 dBA	+2 dBA
Scotty Hollow Road "E" Building Cluster	52 dBA	53 dBA	+1 dBA
Morrison Lane	45 dBA	46 dBA	+1 dBA
Sweet Wood Circle	45 dBA	47 dBA	+2 dBA
11 Russell's Way	43 dBA	45 dBA	+2 dBA
27 Russell's Way	43 dBA	44 dBA	+1 dBA
Danley Drive	43 dBA	45 dBA	+2 dBA
10 Commerce Way	55 dBA	62 dBA	+7 dBA

This data was then used by CTA to estimate sound levels at the north, south, east and west perimeter

[19] More specifically, the May 2009 CTA Report states that the following procedure was employed: "continuous sound monitoring of A-weighted sound levels (dBA) over a week-long duration and short term sampling (ten-minute time intervals) of sound at different frequencies, at multiple locations at/near residential properties around the project site." Further, "[o]ur acoustical analysis of the asphalt plan is based on reference A-weighted (dBA) sound levels . . . provided by the principal asphalt plan equipment and systems manufacturer, together with our own database of octave band asphalt plan sound levels from previous studies . . . . The reference sound data for the proposed asphalt plant is based on sound measurements conducted at an existing asphalt plant that is of the same design equipment make-up, and production capacity as the asphalt plant proposed for the Westford site . . . ."

lines of the Groton Parcel (the "North Boundary Line", "South Boundary Line", "East Boundary Line" and "West Boundary Line"):

TABLE 2: CTA NOISE IMPACT ESTIMATES AT THE BOUNDARY LINES[20]

Receptor Location	Ambient Sound Level	Total Future Sound Level	Increase
Northern Boundary Line	45 dBA	45 dBA	0 dBA
Southern Boundary Line	43 dBA	46 dBA	+3 dBA
Eastern Boundary Line	43 dBA	60-65 dBA	+7-12 dBA
Western Boundary Line	43 dBA	65-70 dBA	+12-17 dBA

Plaintiffs' expert witness classified sound levels of 45–46 dBA as "inaudible, indistinguishable from the existing ambient environment", sound levels of 60-65 dBA as the "low end of conversational voice level", and sound levels of 65-70 dBA as "roughly conversational voice level".

19. Defendants also commissioned a noise impact study, which was conducted by Acentech Inc. ("Acentech"), a sound engineering consultancy firm.[21] Acentech's study included measurement of ambient sound levels at four points along the boundaries of the Groton Parcel, with total future sound levels "based on the sound power levels provided by [CTA's study] and . . . the same factors that [CTA] had used." The results of Acentech's study were as follows:

[20] CTA's estimates for the Eastern and Western Boundary Lines assumed that the noise attenuation barriers they recommended to be installed were in place. Specifically, "'[T]ransportation-type" noise barrier walls can be strategically located and constructed at/near truck unloading areas, front end loader operations areas, at-grade compressor and fan locations, etc. The potential requirements for additional noise control measures could be evaluated following plant construction and . . . [further measures] could be installed without major reconstruction/alteration/shutdown of the plant." These noise attenuation measures were not incorporated into the plans for the Project.

[21] Defendants conducted their own noise impact study because they objected to the methodology of CTA's sound impact study on several bases. First, Defendants claim that CTA's study did not adequately take into account increases in specific frequencies within the overall sound environment. Next, Defendants objected to CTA's assumption of sound attenuation barriers that were not included in the plans for the Project that were submitted to the Board. Defendants' expert witness further noted that CTA's study assumed the absolute upper limit of noise attenuation that a barrier could realistically provide without enclosing the proposed noise source. Finally, Defendants objected to the fact that Plaintiffs' study did not include actual measurements from places along the Groton Parcel's boundaries, but rather made estimates of sound levels on the boundaries based on measurements taken elsewhere.

TABLE 3: ACENTECH NOISE IMPACT MEASUREMENTS AT NEARBY RECEPTORS[22]

Receptor Location	Ambient Sound Level	Total Future Sound Level	Increase
263 Groton Road	49 dBA	50 dBA	+1 dBA
Scotty Hollow Road "E" Building Cluster	56 dBA	57 dBA	+1 dBA
19 Morrison Lane	41 dBA	42 dBA	+1 dBA
31 Russell's Way	36 dBA	40 dBA	+4 dBA

Acentech used the data they and CTA collected to estimate the future noise impact of the Project at the boundaries of the Groton Parcel. Their analysis at the West Boundary Line included projections both with and without attenuation measures taken. The following were Acentech's findings:

TABLE 4: ACENTECH NOISE IMPACT ESTIMATES AT THE BOUNDARY LINES[23]

Receptor Location	Ambient Sound Level[24]	Total Future Sound Level	Increase
North Boundary Line	45 dBA	48 dBA	+3 dBA
South Boundary Line	43 dBA	48 dBA	+5 dBA
East Boundary Line	43 dBA	51 dBA	+9 dBA
West Boundary Line	43 dBA	56 dBA (with barriers); 75 dBA (without barriers)	+13 dBA (with barriers); +32 dBA (without barriers)

[22] Acentech found lower ambient sound levels than were estimated by CTA at the second two locations, but higher ambient sound levels for the first two. The total sound impacts on these locations, as found by Acentech, differed from those estimated by CTA only by 2 dBA or less -- a negligible amount that both parties' experts would agree is below the threshold even of a barely perceivable sound increase.

[23] The Acentech study also included projections of the sound impact on the nearby office building at 10 Commerce Way (ambient sound level of 55 dBA and total future sound level of 62 dBA) and an internal location on the Groton Parcel where Groton had proposed to subdivide the Groton Parcel (ambient sound level of 43 dBA and total future sound level of 59 dBA). In addition, Acentech provided a frequency band analysis of the projected sound, which showed a greater increase at lower frequencies (63, 125, and 250 hertz).

[24] Despite their objections as to the methodology of CTA's study, Acentech's study itself does not appear to have included measurements of sound at the boundary lines of the Groton Parcel. In addition, Acentech's report ultimately utilized CTA's estimated ambient sound levels. It is unclear why neither CTA nor Acentech conducted measurements directly at the boundary lines of Groton Parcel rather than relying on estimates drawn from other receptors.

Traffic Data

20. As part of the materials submitted in support of the Project, Newport submitted the results of a traffic study conducted by Greenman-Pedersen, Inc. ("GPI"), which analyzed the expected impact the Project would have on local traffic. According to GPI's traffic analysis, the Project would result in approximately 100 vehicles accessing Locus every day, resulting in approximately 199-203 trips (defined as every coming or going from Locus via public roads) per diem. This total is reached as follows:

TABLE 5: PLAINTIFFS' TRAFFIC IMPACT PROJECTIONS

Reason for Access	Number of Vehicles/Trips
Importing aggregate to Locus	18 (36 trips)
Importing RAP to Locus	13 (26 trips)
Importing fuel and bitumen to Locus	3 (6 trips)
Employees, visitors, and deliveries	3-5 (6-10 trips)
Exporting asphalt from Locus	63 (~125 trips)

These projections are based on a number of stated assumptions, including:

(a) that aggregate would comprise 75% of the asphalt produced, that 50% of this aggregate would come from the Fletcher Quarry via non-public quarry roads (which were not considered in calculating trips), and that all aggregate from offsite locations would be delivered in 32-ton capacity vehicles operating at 100% capacity;[25]

(b) that RAP would comprise 25% of the asphalt produced, which would be delivered in 30-ton capacity vehicles

[25] Defendants argue that the fact that Newport may import some of the aggregate for the Project from the Fletcher's Quarry is speculative and irrelevant, since Plaintiff is under no obligation to import aggregate from Fletcher's Quarry. Even if they were under such an obligation, Defendants continue, the calculation of trips (for purposes of determining whether the requirement to apply for a MCP special permit) must include all trips to and from Locus -- including those from the Fletcher's Quarry on non-public roads.

operating at 100% capacity;[26]

(c) that the maximum output of the Project would be 1,500 tons of asphalt per diem, which would be delivered in 24-ton capacity vehicles operating at 100% capacity;[27] and,

(d) Plaintiff's stated willingness to stipulate that the Project will not be permitted to generate more than 250 trips per diem.[28]

21. Defendants also submitted expert evidence as to the potential traffic impact of the Project. Defendants' expert testified that an accurate traffic impact study must take into consideration such variables as employee trips, visitors, deliveries, weather, economics, and seasonality. Defendants' traffic expert also testified that the size and capacity of import/export trucks, as well as the reasonableness of expecting such trucks to carry loads at full capacity, are additional relevant factors in assessing the potential traffic impact of a proposed use.

22. Defendants' traffic expert testified that if Plaintiffs' above-noted assumptions as to the sourcing of aggregate, overall production, and importation of RAP were removed, the total average number of trips could range anywhere from 260 to 444 trips per diem, and that peak traffic could range from around 400 trips per diem and up.

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[26] Defendants argue that Plaintiffs are not obligated to limit their RAP usage to 25% of finished product, and that the relevant measurement of potential RAP traffic should be based upon the MassDEP-permitted RAP level of up to 40%.

[27] Defendants claim that Newport is under no obligation to limit the maximum output of the Project to 1,500 tons per diem -- a figure, they argue, that is based only on Plaintiffs' stated willingness to stipulate to such a limit. Rather, they argue, the relevant potential output of the Project is, at minimum, the average maximum daily capacity of 2,300-2,500 permitted by MassDEP, or, at maximum, the theoretical maximum output of the Project of 5,000 tons per diem.

[28] Defendants dismiss Plaintiffs' willingness to so stipulate as "self-serving", which suggests that Defendants -- for reasons not brought to the court's attention -- are themselves not willing to stipulate to this as a condition of any approval of the Project. Defs. Post-Trial Br., p. 68. Although, as discussed below, Plaintiffs' willingness to stipulate to a maximum number of vehicle trips is not relevant for purposes of determining whether an MCP permit is required, it is quite obviously relevant to the issue of whether such a permit should be approved upon remand. As Plaintiffs point out in their post-trial brief, a stipulated maximum number of trips can easily be made a condition of an MCP permit. Thus, while the issue of whether or not to grant an MCP permit subject to such a condition is not presently before the court, it is the opinion of this court that it would be unreasonable for the Board, upon remand of this matter, to ignore Plaintiffs' stated willingness to stipulate as to the maximum number of vehicle trips associated with the Project in determining whether to approve an MCP permit for the Project.

Defendants' Motion to Strike

Before resolving the merits of this case, the court must rule on Defendants' February 21, 2014 motion to strike a portion of Roy's affidavit. In their opposition to the motion, Plaintiffs concede that the portions of Roy's affidavit concerning the concrete plant located at 520 Groton Road are inadmissible pursuant to this Court's order dated October 24, 2013. The court concurs. Thus, Defendants' motion is allowed to the extent that paragraphs 2, 6, 14, 18, and 20, and exhibits 7, 8, 10, 11, 12, 13, 21, 22, 23, 24, 25, 26, and 27 of Roy's affidavit (plus page 5, ¶ 2; page 6, ¶ 3; and page 7, ¶ 1 of Roy's interrogatory answer) are stricken. In addition, paragraphs 5 and 16 (and Exhibit 14) of Roy's affidavit (which deal with his opinion as to whether extraction of rock could occur at Locus) is irrelevant, since Plaintiffs' application to the Board does not propose any such operation. This inadmissible testimony is therefore stricken. Finally, exhibits 6, 7, 8, 20, 31, and 42 to Roy's affidavit constitute inadmissible hearsay, and are also stricken.

Standard of Review on Appeal

In an appeal filed under G.L. c. 40A, § 17, the court's review of the facts at issue and determinations of the Board is de novo; as such, the findings and determination of the Board are accorded no evidentiary value. E.g., Josephs v. Bd. of App. of Brookline, 362 Mass. 290, 295 (1972). Nonetheless, the court's review is "circumscribed: the decision of the [Board] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." Roberts v. Sw. Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999) (quotations omitted); see also Britton v. Zoning Bd. of App. Of Gloucester, 59 Mass. App. Ct. 68, 73 (Mass. App. Ct. 2003) ("a highly deferential bow [is due] to local control over community planning").

In sum, the court's task is "to ascertain whether the reasons given by the [Board to disallow the Project] had a substantial basis in fact, or were . . . mere pretexts for arbitrary action or veils for

reasons not related to the purposes of the zoning law." Vazza Props., Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 312 (Mass. App. Ct. 1973); see also Britton, 59 Mass. App. Ct. at 74-75 (the local board's decision must be supported by a rational view of the facts).

Use of Locus

In determining whether the Board's denials of Plaintiff's site plan review, MCP, and WRPOD applications were "arbitrary and capricious", and in order to issue the judicial determinations on the questions of statutory construction raised by Plaintiffs, the court must consider three primary issues. First, the court must determine whether the Project constitutes a "quarrying [and] mining" operation. As discussed below, the court finds that it does not. Next, the court must determine whether the Project constitutes a "light manufacturing" operation. This inquiry requires an assessment of the parties' expert evidence as to the expected noise impact of the Project. And, as discussed below, the court finds that the Project, in its present form, does not constitute light manufacturing, but that if revised plans were submitted to include noise attenuation barriers, it would likely so qualify.[29] Finally, the court must determine whether the requirement to apply for a MCP special permit (or any other special permit) applies to the Project. As discussed below, the court finds that this requirement does apply.

Standard rules of statutory construction dictate that plain, unambiguous language must be interpreted by the courts "in accordance with the usual and natural meaning of the words." Gillette Co. v. Comm'r of Rev., 425 Mass 670, 674 (1997) (quotations omitted); see also Comm'w v. DeBella, 442 Mass 683, 687 (2004) ("When the ordinary meaning of words yield a workable and logical result, there is no need to resort to extrinsic aids' in interpreting the statute." (quotations

[29] As discussed below, the plans for the Project must also be revised so as to comply with the requirement that it will employ at least five employees. Alternatively, the site plan review application could be amended to include a request for a variance from this requirement of the Bylaw.

omitted)). Zoning bylaws in Massachusetts "must be reasonably construed", and "should not be so interpreted as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning." Green v. Bd. of App. of Norwood, 358 Mass 253, 258 (1970). In so doing, the courts also give "some measure of deference" to a planning board's interpretation of its own bylaws. E.g., APT Asset Mgmt. v. Bd. of App. of Melrose, 50 Mass. App. Ct. 133, 138 (Mass. App. Ct. 2000).

A. Use as of right as "quarrying [and] mining"

Counts IV and V in Plaintiffs' Second Amended Complaint seek a judicial determination and declaratory judgment that the Project constitutes a quarrying and mining operation and would therefore be allowed as of right at Locus. Plaintiffs argue that the Project constitutes quarrying and mining because at least half of the aggregate is intended to be extracted from the abutting Fletcher Quarry, and because the operation of the proposed asphalt plant will constitute the "processing and finishing" of rock products. However, Plaintiffs concede that, under the current Project design, no rock would be extracted from Locus itself.

Section 10.2 of the Bylaw, which defines "quarrying [and] mining", requires both "extraction of rock" and the "processing and finishing" thereof; the conjunctive nature of this definition entails that both of these activities must occur for a use to fall under the definition. It is undeniable that the Project would entail "processing and finishing" of rock products; however, the "extraction" requirement is not met. Plaintiffs' suggested construal of this term would permit processing and finishing of rock products extracted from any source under the this definition, which would effectively read the words "extraction of rock" out of the Bylaw entirely.

Plaintiffs' argument that they meet the "extraction" requirement because their current plan is to have 50% of the aggregate extracted from the Fletcher Quarry is unavailing. First, the extraction of aggregate by a third-party from a different parcel (irrespective of how near it may be to Locus)

owned by a different entity is entirely irrelevant to the determination of whether the Project itself would include extraction of aggregate. Moreover, because Newport is under no obligation to purchase their aggregate from the Fletcher Quarry, there is nothing preventing them from changing the source of the materials being processed. As a result, I find that the Project does not constitute "quarrying [and] mining" under Section 10.2 of the Bylaw.

B. Use as of right as "light manufacturing"

Counts II and III in Plaintiffs' Second Amended Complaint seek a judicial determination and declaratory judgment that the Project qualifies as an of right use as a light manufacturing operation in the IA zoning district in which Locus is located. Counts VIII and IX further request a judicial determination and declaratory judgement that the meaning of the term "light manufacturing" "must be interpreted reasonably and in such a way that an applicant can understand its meaning" by taking into consideration, among other things, "recognized industry or regulatory standards".[30]

Since the parties have agreed that the Project would not violate the Prohibition Clause of Section 10.2, the only issues here are (a) whether the Project would employ more than four employees, and (b) whether the Project would constitute "fabrication, assembly, processing or packaging operations employing only electric or other substantially noiseless and inoffensive motor power, utilizing hand labor or quiet machinery and processes . . . ."

It is immediately apparent that, even if the Project were found to constitute "light manufacturing", as it is presently proposed, it would nonetheless not be allowed of right at Locus because, pursuant to the Bylaw, light manufacturing employing four or fewer employees is not permitted of right in IA zoning districts. As testified to by the principal of Newport, the Project would employ only three employees. Thus, as presently conceived, the Project is not an of right

[30] Count 8 actually refers to "the Prohibition Clause", not to the definition of "light manufacturing"; this appears to be a mere scrivener's error, which the court will disregard.

use.[31]

Because the Project would not be allowed as of right even if found to constitute light manufacturing, the court need not proceed any further on the question of whether the Project would be permitted as of right as a light manufacturing operation. Nonetheless, it will be instructive to the parties to opine on whether that definition is applicable to the Project.

The Bylaw's definition of "light manufacturing" is somewhat vague and contains several fact-specific qualifiers (i.e., "substantially", "noiseless", "inoffensive", and "quiet") that are not defined or elaborated upon in the Bylaw. When the ordinary meanings of the terms of the Bylaw are defined, we can arrive at a perfectly workable and logical result. Thus, it does not appear that it is necessary to look beyond the text of Section 10.2 of the Bylaw to determine how the term "light manufacturing" should be applied. As such, while the Bylaw obviously must be interpreted "reasonably and in such a way that [Plaintiffs] can understand its meaning," there is no reason to turn to "recognized industry or regulatory standards" for insight into such meaning.

When we parse the Bylaw's definition of "light manufacturing", we find three distinct

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[31] Plaintiffs, in their reply to Defendants' post-trial brief, argue that Defendants should be barred from addressing this issue because it was not discussed in the parties' joint pre-trial memorandum. This argument is unavailing. Plaintiffs had ample notice that this would be an issue in this case, given that it was raised in the pleadings, in Land Court Decision 1, and at trial.

Plaintiffs further contend that the requirement that a project employ not fewer than five employees to qualify in the IA district is arbitrary and unreasonable. They may very well be correct. Indeed, this court can think of no reason why a zoning ordinance would permit large-scale manufacturing operations but forbid small-scale manufacturing operations. Specifically delineating a subclass of light manufacturing employing four or fewer employees would seem to make sense only if the intent were to permit the opposite arrangement: allowing only small scale manufacturing in, for example, areas at close proximity to residential areas. Moreover, the phrasing of this requirement in the negative as "not more than four employees" seems to support this rationale for differentiating light manufacturing operations based on their size.

The nonsensicality of this application of the Bylaw notwithstanding, the law is on the books, so this court must apply it. If Plaintiffs believe this aspect of the Bylaw to be arbitrary and unreasonable, their recourse is to challenge it under G.L. c. 240 §14A or G.L. c. 231A. While Plaintiffs, in their Second Amended Complaint, sought a judicial determination and a declaratory judgment as to the interpretation and application of the term "light manufacturing", the pleadings do not request the same relief with respect to the reasonableness of the Bylaw's prohibition of light manufacturing operations operating with fewer than five employees in IA zoning districts. This issue was not briefed by the parties or addressed at trial. In fact, Plaintiffs first raised the issue in their post-trial brief.

As an alternative to filing a judicial challenge to this aspect of the Bylaw, Newport can easily remedy this defect on remand to the Board by simply revising the site plans for the Project so that five or more employees will be employed.

elements that the Project must contain in order to be reasonably classified as such. Namely, it must (a) constitute "fabrication, assembly, processing or packaging operations", (b) it must "employ[ ] only electric or other substantially noiseless and inoffensive motor power", and (c) it must utiliz[e] hand labor or quiet machinery and processes".

1. **"[F]abrication, assembly, processing or packaging operations"**

Although arguments could be made that the Project will constitute fabrication or assembly, the most obvious route to a determination that the Project satisfies this requirement is through "processing", which, as noted above, Defendants' expert, Terry Szold, seemed to concede was applicable to the Project. I find that the Project will constitute "processing", and therefore meets the first requirement of the Bylaw's definition of "light manufacturing".

2. **"[E]lectric or other substantially noiseless and inoffensive motor power"**

On its face, the scope of this provision is very narrow: it pertains only to the means by which a proposed use is powered -- not to the proposed use considered as a whole. Thus, "substantially noiseless and inoffensive" are requirements only of the Project's power source. Further, the use of the word "other" here implies that electric power qualifies as "substantially noiseless and inoffensive". These descriptors would therefore only apply to some form of non-electrical "motor power" -- such as a gasoline-powered generator.

As noted above, neither party specifically addressed the issue of the Project's power source and whether it could be described as "substantially noiseless and inoffensive". Rather, they focused instead on whether the Project's operations generally could be described as such. As such, the court was required to consider this issue without the assistance of relevant expert testimony or briefing.

Based upon the court's cursory review of the Project plans, it appears that the majority of the equipment sought to be installed will be powered substantially (if not entirely) by electrical means.

At first blush, then, it would appear likely that this requirement will be satisfied by the Project. However, because Plaintiffs did not address this issue through the testimony of their expert witnesses and did not provide briefing of this issue, the court is presently unable to conclude that Plaintiffs have satisfied their burden of demonstrating that the Project would be powered solely by electric power, or that any non-electrical motor power would be substantially noiseless and inoffensive.[32]

3. "[H]and labor or quiet machinery and processes"

The record is clear that the Project will employ no hand labor (other than the prospective employees' operation of the equipment proposed to be constructed). Thus, we must determine whether the "machinery and processes" to be operated as part of the Project would "[m]ak[e] or [be] characterized by little or no" "sound that is loud, unpleasant, unexpected, or undesired".[33] Notably, this does not mean that the Project must generate little or no sound, full stop; rather, such sound must not be so harmful as to constitute noise.

The Bylaw is entirely silent as to the definition of "quiet" and how the concept of "noise" is to be assessed in determining whether a use would constitute light manufacturing. Thus, the court

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[32] On remand to the Board, Plaintiffs should address this issue, and the Board's determination of whether the Project satisfies this requirement shall be governed by the court's interpretation of the phrase "[E]lectric or other substantially noiseless and inoffensive motor power". The court further reminds Defendants that, to the extent that the Project will include non-electrical motor power sources, the requirement that such sources be "substantially noiseless and inoffensive" does not require that they be completely silent. So long as the sound generated by any such power sources (when considered in the context of the Project, Locus, and the surrounding properties) would not rise to the level of "noise" (as discussed below), it would be reasonable. Moreover, if the sound generated by the Project as a whole would not rise to the level of "noise", the mere fact that any non-electric motor power sources could be deemed not to be "substantially noiseless and inoffensive" would not be a reasonable basis upon which to deny approval of the Project.

[33] As noted above, both parties' analyses of the noise impact of the Project were couched not in terms of whether the Project would be "quiet", but rather whether it would be "substantially noiseless and inoffensive" -- a requirement that the court has determined is applicable only to the power source of a prospective use. The fact that the Bylaw employs two different descriptors creates two different standards by which two different aspects of a proposed use are to be measured. I conclude that the "quiet" standard is less stringent than the "substantially noiseless and inoffensive" standard. The "substantially noiseless and inoffensive" standard, on its face, would seem to be an almost impossible standard to meet if applied to a proposed use considered as a whole, and would certainly run afoul of the requirement that bylaws be interpreted and applied reasonably. See Green, 358 Mass. at 258. Thus, to the extent that the Board's operating procedure is to apply the "substantially noiseless and inoffensive" requirement to proposed uses considered as a whole, they misapply the Bylaw.

interprets this term in the general context of the provisions of the Bylaw, and with reference to relevant standards and practices of the MassDEP. The most relevant provision of the Bylaw is Section 9.3A.4(2)(A) of the Bylaw (which pertains specifically to MCPs, and not to "light manufacturing" uses), which prohibits uses that create a sound level exceeding the lower of 70 dBA or 10 dBA above the ambient sound level, measured at the property boundaries of the receiving land use. This "10 dBA above ambient" standard is echoed by the MassDEP's noise policy, as is the recommended location of assessment.

I find that this standard set forth in Section 9.3A.4(2)(A) of the Bylaw is a reasonable one for determining whether, for purposes of satisfying the definition of "light manufacturing", the Project is expected to be quiet.[34] I further note that Section 9.3A.6 of the Bylaw permits these standards to be waived "where such waiver is not inconsistent with the public health and safety, and where such waiver does not undermine the purposes of this section and the proposed development will serve the goals and objectives set forth in Section 9.3A.1." MassDEP noise regulations likewise provide for such a waiver -- which is likely the reason why MassDEP approved the Project.

In order to determine whether the Project will be "quiet", I must first determine where prospective noise should be measured -- directly at the source of the sound (Locus), at the Boundary Lines, and/or at the location of the nearest residential receptor(s). As was the case with the definition of "quiet" itself, the Bylaw is silent on this question, so I must again look elsewhere for guidance. Section 9.3A.4(2)(A) of the Bylaw (which, as noted, pertains specifically to MCPs -- not to light manufacturing uses) provides that sound should be "measured at the property boundary of the receiving land use." This approach is supported by MassDEP's policy with respect to the evaluation

[34] As a corollary, because Plaintiffs' expert witness plausibly testified that the Project is not expected to produce pure tones (such as sirens or alarms), I find that the overall measurement of sound pressure (measured in dBA) is an adequate means by which to assess the potential noise impact of the Project, and that analysis of individual frequencies of sound (as advocated by Defendants) is neither necessary nor relevant.

of noise, which calls for measurements to be taken "both at the source's property line and at the nearest residence or other sensitive receptor (e.g., schools, hospitals) . . . ."

Succinctly stated, the purpose of the Bylaw, as stated in Section 1.3 thereof, is to strike an optimal balance between promoting the productive use of properties and protecting the surrounding environment from any possible ill effects that such uses may engender. With respect to noise, the Bylaw seeks to "reduce noise pollution in order to preserve and enhance the natural and aesthetic qualities of the Town; preserve property values; and preserve neighborhood character."

In view of these provisions, it is clear that the Bylaw is not meant to prevent sounds that, although possibly harmful, are nonetheless deemed acceptable by the owners of a particular property, but rather to prevent such sounds from adversely affecting adjacent landowners. Therefore, the noise impact within the Groton Parcel (including at Locus itself) will not be considered.[35] Rather, the closest locations to Locus where a relevant adverse impact may be caused by the Project would be at the perimeters of the Groton Parcel, which the court deems to be the "property boundary of the receiving land use".[36] In view of the purposes of the Bylaw and relevant MassDEP practices, the court further deems it relevant to consider the impacts of noise on the nearby residential properties.

Because Defendants' noise impact study worked off of the ambient sound levels estimated in Plaintiffs' sound analysis, the court finds that there is no dispute as to the ambient sound levels at the boundaries of the Groton Parcel. See Table 2 & Table 4, *supra*. As such, I find the

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[35] In view of the facts that (a) Groton, the owner of Locus and lessor of the Newport Parcel, has aligned its interests with those of Newport, and (b) there is no known objection of record from any other tenant or occupant at Locus, the court deems it unnecessary to consider the noise impact at the boundaries of the Newport Parcel, as the only difference doing so would make would be to measure the noise impact upon other areas of the Groton Parcel itself. With respect to the noise impact on Locus itself, the court notes, as an aside, that there are federal and state mechanisms in place to ensure that such noise is not harmful to employees.

[36] Defendants cite Groton's prospective plans to subdivide a portion of the Groton Parcel and suggest that the boundary of this subdivision should be treated as a relevant receptor. This argument is unduly speculative, as it posits an imaginary future abutter, and imputes an objection to noise created by the Project. The record indicates that Groton currently owns the entirety of the Groton Parcel, and therefore the hypothetical sub-parcel is not a separate, adjacent property. Defendants' sound analysis at the boundary of the subdivided area is therefore not relevant, and will not be considered.

determination that the ambient sound levels would be 43 dBA at the South, East, and West Boundary Lines, and 45 dBA at the North Boundary Line to be accurate.[37]

Because the Project, as proposed, does not include any barrier attenuation, the court finds that CTA's assumptions with respect to barrier attenuation are unjustified. See Table 1 & Table 2, *supra*. Thus, the court finds that the relevant measurements of potential noise impacts of the Project are those figures that do not include assumptions with respect to hypothetical noise barriers. See Table 4, *supra*. As such, the court finds Defendants' expert evidence as to total future sound levels to be credible and relevant, and finds Plaintiffs' evidence as to total future sound levels to be unreliable, since it takes into account unjustified assumptions with respect to barrier attenuation.

In view of the foregoing findings, the court makes the following factual determinations with respect to the total future sound levels at the Boundary Lines:

TABLE 6: COURT'S FINDINGS ON THE EXPECTED NOISE IMPACT OF THE PROJECT[38]

Receptor Location	Ambient Sound Level	Total Future Sound Level	Increase
North Boundary Line	45 dBA	48 dBA	+3 dBA
South Boundary Line	43 dBA	48 dBA	+5 dBA
East Boundary Line	43 dBA	51 dBA	+9 dBA
West Boundary Line	43 dBA	75 dBA	+32 dBA

With respect to nearby residential receptors -- which are located farther afield than the Boundary Lines, and should therefore be expected to experience a lessened noise impact due to distance attenuation -- the court accepts the findings of Acentech's study, and determines that the

[37] The court notes, again, that these figures represent estimates, not direct measurements, which both parties' noise impact surveys employed.

[38] Having concluded that the relevant receptor locations are the North, South, East, and West Boundaries of the Groton Parcel, as well as nearby residential receptors, the court declines to make any rulings as to the sound impact on any other receptor location, including any location within the boundaries of the Groton Parcel.

nearest residential receptor to the west would experience an increase of 4 dBA (an increase slightly greater than "barely perceivable"), while the residential receptors to the north, south, and east would experience only negligible, unperceivable increases of 1 dBA. See Table 2.

Measured against the standards in place pursuant to Section 9.3A.4(2)(A) of the Bylaw and MassDEP noise regulations, we see that one of the relevant receptors (i.e., the West Boundary Line) is expected to experience an increase in total sound pressure of greater than 10 dBA above ambient to above 70 dBA. Barring a variance from the Board, therefore, the Project, as presently conceived (without noise attenuation barriers), would not constitute "quiet machinery and processes" for purposes of determining whether it qualifies as light manufacturing.[39] Accordingly, I find that, as presently conceived, the Project is not allowed as of right at Locus.[40] Based upon the foregoing, I further find that the Board's denial of Plaintiffs' site plan review (and MCP and WRPOD special permit applications) was not "arbitrary and capricious and legally untenable".

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[39] As discussed above, both the Bylaw and MassDEP noise regulations permit variances from usual noise standards in appropriate cases. Here, the only relevant receptor where the sound level would rise to the level of "noise" is the Western Boundary, which abuts the Fletcher Quarry. To the best of the court's knowledge, the operator of the Fletcher Quarry does not object to the Project. Given the industrial use of the Fletcher Quarry, it seems highly unlikely that the operator would even have the basis for an actionable objection. Moreover, the surrounding area is substantially industrial in nature, containing multiple concrete plants, the Fletcher Quarry, and other industrial and commercial uses -- all of which are served by several already-busy state highways. There is no risk of this arrangement being disturbed, as covenants running with surrounding properties (which used to be part of the Fletcher Quarry parcel) restrict residential uses. In sum, it is difficult to imagine a more suitable location for the construction of an asphalt plant than where Plaintiffs propose to build it, nor a more economically optimal use of Locus than the processing of the products of the next-door quarry.

Nonetheless, it is not the province of this court to substitute its own judgment for that of the Board. Since the Project (without noise attenuation barriers) could not fairly be characterized as "quiet", it would require a variance from the Board -- for which Plaintiffs have not applied. Under such circumstances, although the Board's actions may not be the most reasonable course, the court cannot find that no "rational view of the facts" supports the Board's decision. Britton, 59 Mass. App. Ct. at 75. This would not be the case if Plaintiffs' proposals had included noise attenuation barriers.

[40] Based upon the court's findings above as to the meaning of "quiet" for purposes of Section 10.2 of the Bylaw, on remand to the Board, if Plaintiffs submits revised plans for the Project that include (a) a commitment to employ five or more employees and (b) plausible means of noise attenuation such that the noise impact on the West Boundary Line would be 69 dBA or less, it is the opinion of this court that the Project would be allowed as of right at Locus, subject to the requirements (discussed below) as to obtaining MCP and WRPOD special permits, as well as a special permit to operate multiple principle uses at the Groton Parcel (which, the court expects, given the multiple uses already being conducted at the Groton Parcel, would be routinely granted). As discussed above, such a renewed application should also address the issue of whether the Project will include any non-electrical motorized power sources, and whether any such source would be "substantially noiseless and inoffensive".

C. Special permitting requirements

Because the court has found that the Project does not -- as presently conceived -- constitute light manufacturing that would be allowed as of right at Locus, it follows that the Board's denials of Newport's applications for MCP and WRPOD special permits (and the issue of whether Newport was required to file a MCP special permit application at all) are moot.[41] Nonetheless, since, as noted above, it appears that the Project would constitute light manufacturing if it were resubmitted with certain changes included, it would be instructive to opine on whether such application should also be accompanied by an application for a MCP special permit.

As discussed above, the parties agree that the Project would trigger the requirement to apply for an MCP special permit only if it would generate more than 250 vehicle trips per diem. Since there is no way to know what the actual traffic impact will be until the Project is up and running, the prospective impact must be estimated.

Plaintiffs' position here, in essence, is that it is possible that the total number of trips to and from Locus could stay below the MCP threshold, and that, in any event, they are willing to stipulate to keep the number of trips below 250 per diem. Defendants take the opposite position, and argue that it is not relevant whether the number of trips could possibly be less than 250 per diem or whether Plaintiffs are willing to stipulate to a maximum number of trips; rather, Defendants argue, for purposes of determining whether an MCP permit is required, the issue is whether it is possible that the number of trips could exceed 250 per diem. And, they claim, if certain assumptions made by Plaintiffs in their traffic study are eliminated, the possible traffic impact rises to the MCP special

[41] Due to their initial determination that the Project was not a permitted use in the IA zoning district, the Board did not address the merits of the MCP or WRPOD special permit applications. With respect to their application for a MCP special permit, Plaintiffs not only attack the Board's determination that it did not have jurisdiction to issue a MCP special permit, they also seek a determination that the MCP requirements do not apply to the Project, and that they therefore did not actually need to file an application for the MCP special permit in the first place. Plaintiffs do not dispute the need for a WRPOD special permit; rather, they merely attack the Board's determination that it did not have jurisdiction to issue a WRPOD special permit.

permit threshold, thus triggering the requirement to apply for an MCP permit.

Under the optimal conditions that Plaintiffs' traffic study assumes, the number of trips generated by the Project could possibly remain below the MCP threshold. However, if any one of the number of variables in Plaintiff's assumptions were to change (such as, for example, if Plaintiff were to decide to use more than 25% RAP, or if smaller trucks were used), the total number of trips could very reasonably be expected to exceed this threshold.[42] Moreover, the Bylaw's specific incorporation of the standards of the "ITE Trip Generation Manual" means that Plaintiffs' estimates must include internal trips between Locus and the Fletcher Quarry.

In sum, having reviewed the expert evidence adduced by the parties, the court is convinced that the number of trips generated by the Project could possibly range from 260 to 444 per diem. As such, I find that the requirement to obtain an MCP permit for the Project was triggered.[43] I further find that the Board's denial of Plaintiffs' application for a MCP special permit was not "arbitrary and capricious and legally untenable", since such action was taken merely as a corollary to the Board's proper denial of Newport's site plan review application.[44]

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[42] In addition, Plaintiffs' estimates are problematic insofar as they depend upon self-imposed limits to the amount of finished product expected to be produced by the Project that are well below their maximum permitted output under their MassDEP permit. They also rely on non-existent commitments to purchase aggregate from the Fletcher Quarry, non-binding limits on the amount of RAP to be used, and unrealistic assumptions as to the number, size, capacity, and efficiency of vehicles making deliveries to and from Locus. The court makes no finding with respect to the impact of seasonality, whether Fletcher Materials would use its own finished asphalt product in its road works projects, and potential trips relating to employees or deliveries, as these factors are too speculative to be considered reliable evidence of the expected traffic impact of the Project.

[43] Therefore, if Plaintiffs were to resubmit their plans for the Project in a revised form in accordance with the court's instructions herein, their application should be accompanied by an application for a MCP special permit. At that point, Plaintiffs' assumptions and discounts as to the expected number of vehicle trips will become relevant. Likewise relevant at that stage will be Plaintiffs' offer to stipulate to a maximum number of vehicle trips, since the Board's approval of such a special permit could easily be conditioned so as to include this stipulation.

[44] The parties have not addressed the WRPOD special permit application on its merits. As with the Board's denial of Newport's MCP special permit, it appears that the Board denied Newport's WRPOD special permit application as a corollary to their proper denial of Newport's site plan review application. Thus, I decline to find that the Board's denial of Plaintiffs' application for a WRPOD special permit was "arbitrary and capricious and legally untenable".

* * *

In conclusion, I find that the Project (as presently conceived) does not constitute quarrying and mining or light manufacturing, and is therefore not allowed as of right at Locus; as such, the Site Plan Review Decision was not "arbitrary and capricious and legally untenable". I further find that, because the Board properly denied Newport's site plan review, Newport's applications for MCP and WRPOD special permits became moot, so the Board's denial of these applications was proper. The Board's decisions to deny Newport's applications are therefore upheld -- albeit for reasons that, as discussed above, are different than those stated therein.

The case is remanded to the Board. Plaintiffs should resubmit to the Board a modified site plan review application (a) incorporating the sound attenuation barriers recommended by CTA, (b) providing that the Project will employ five or more employees, (c) requesting a variance to operate more than one principal use on the Groton Parcel, and (d) addressing the issue of the Project's power sources. Such a revised application must be also accompanied by revised applications for MCP and WRPOD special permits. If so submitted, it would appear to this court that the Project would then be permitted as of right as a light manufacturing use at Locus, subject to such conditions as the Board may reasonably require in order to approve Newport's special permit applications.

In the interest of avoiding future litigation before this court, the Board's assessment of any such resubmitted plans shall be made in accordance with the findings and rulings contained in this decision. The parties are strongly encouraged to maintain an active and open dialogue throughout the resubmission process in order to resolve any continuing dispute they have in such a way as to ensure that Locus can be most optimally used by Plaintiffs while also accommodating any legitimate

concerns Defendants may have as to the possible effects such use(s) may have.[45]

This court retains jurisdiction over this matter after it is remanded to the Board. Newport's revised site plan review application and MCP and WRPOD special permit applications shall be submitted to the Board (in accordance with the court's above instructions) within four weeks of the date of this Decision, and Newport shall promptly inform the court's sessions clerk when such filing is made. The Board's decisions on Newport's revised applications shall issue not later than four weeks after Newport's filing of same. The parties shall promptly notify the court as to the Board's remand decision and whether further proceedings before this court will be necessary to resolve the parties' dispute.

To the extent that the parties would like a status conference in order to discuss any of the foregoing, they should contact the court's sessions clerk to set up such a conference for Tuesday, January 6, 2015 at 10:00 A.M.

Final judgment in this matter will be held pending the Board's remand decision.

Alexander H. Sands, III
Justice

Dated: December 8, 2014

[45] As discussed above, it is the opinion of this court that the Project would be an ideal use of Locus, given its proximity to the Fletcher Quarry and Newport's rock crushing facility, and based upon the overall industrial nature of the area. And, while Defendants' concerns as to the noise impact and traffic impact of the Project are perfectly legitimate, Plaintiff has signaled a willingness to agree to build noise attenuation barriers and to stipulate to a maximum number of vehicle trips, which would appear to be a perfectly reasonable way to accommodate Defendants' concerns. Any other issues as to compliance with the letter of the Bylaw would seem to be minor issues resolvable through variances.

In sum, this dispute should have been resolved long before it came before this court. Yet, the parties' inability or unwillingness to resolve their disputes has resulted in over four years of costly litigation, including two summary judgment motions, numerous other procedural motions, and a three-day trial -- all of which might have been avoided.

To Whom it May Concern,

I am an abutter to the property located 540 Groton Road. I have reviewed the applications and materials filed with the Planning Board and Zoning Board on January 5, 2015, and have no issues with the proposed Project. Furthermore, I have no issues with the potential sound that the Project may create. I support the granting of the requested permits including, the waiver of the sound attenuation barrier along my property line.

Signed: 1-13-15

T. G. McGlinn

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March 10, 2015

Mr. Richard DeFelice, President
Newport Materials
20 Commerce Way
Westford, MA 01886

Project: Proposed Newport Materials Asphalt Plant, Westford, MA

Subject: Revised Acoustical Evaluation
In Accordance with Town Of Westford Peer Reviewer Request

Dear Mr. DeFelice,

You have informed this office that, in connection with the permitting process for the proposed Newport Materials asphalt plant, the Peer Reviewer providing acoustical consulting services to the Town of Westford has requested supplemental acoustical information from Cavanaugh Tocci Associates, Inc. (CTA).

For the asphalt plant acoustical evaluation, the Peer Reviewer has requested the following:

- Consideration of noise control treatments applied at/near plant sound sources (in addition to the concept design for a large sound barrier wall near the Newport Materials western property line, which has been discussed in recent CTA reports).
- Evaluation of plant sound sources located at elevations higher than 8-feet above grade.
- Submittal of a revised CADNA acoustical-projection computer model incorporating the two categories of evaluation listed above.

This letter report is transmitted to you via email, together with an electronic file containing the revised CADNA computer model that we prepared this week in accordance with the Peer Reviewer request.

Following your review and approval of this letter and CADNA electronic file submittal package, please forward to the Town of Westford.

Executive Summary

This report further refines, details and illustrates noise control techniques that were presented in CTA June 2009 report, which included the Noise Form Application that was approved by MassDEP (a portion of the 2009 report is attached to this letter). This report evaluation also maintains the design concept for a concrete wall sound barrier near to the Newport Materials western property line presented in CTA January 2015 report.

The 2009 report presented specific recommendations for the application of silencers on the dryer drum combustion blower and the baghouse exhaust fan, and discussed in concept the potential installation of acoustical panel sound barrier assemblies that could be located adjacent to specific at-grade and upper-elevation sound sources (including top-of-silo sound sources).

This current report maintains and confirms the previous silencer recommendations, and specifically identifies the locations and pertinent dimensions of, and product specifications for, three separate metal panel sound barrier wall assemblies presented for consideration to be installed near specific plant sound sources. These near-source acoustical panel assemblies would supplement the large concrete sound barrier wall near the Newport Materials western property line, which has been discussed in CTA January 2015 report.

The principal conclusions of this current report (and attached revised CADNA computer model electronic file to be forwarded to the Peer Reviewer) are that with the current-design noise controls (as of this report date) which have been developed in accordance with the Peer Reviewer request:

- All sound produced simultaneously from all asphalt plant sound sources operating during full plant operations at all elevations above grade would result in sound levels of **less than 53 dBA** at all locations along the Newport Materials western property line, and at all locations at all elevations on the Fletcher Quarry industrial rock quarry property, which is located to the west of the Newport Materials western property line.

- The CTA refined noise control design response in accordance with the Peer Reviewer request has resulted in current projections of sound levels that are lower (better) than previous projections, and which indicate acoustical compliance with the most-stringent applicable acoustical criteria of the Town of Westford, at the compliance location stipulated in the Land Court Decision (and beyond).

Introduction / Previous Evaluation

This report supplements previous acoustical evaluation reports prepared by CTA, which have been submitted to the Town of Westford commencing in early 2009, in connection with the original plant permitting application process; and extending through recent reports submitted to the Town during January 2015, in connection with the current Planning Board review process.

For the acoustical evaluations summarized in these reports, CTA has interpolated sound measurement data provided by asphalt plant manufacturer Gencor Industries, Inc., for the Gencor 400 Ton Skidded Ultraplant proposed to be constructed and operated at the Newport Materials project site, in order to establish a sound power "acoustic center" of the asphalt plant, which we located at a point in space 8-feet above grade in our calculations.

The 8-feet above grade acoustic center sound data were input to our CADNA acoustical computer model software, as the basis to calculate sound levels that would be transmitted from the proposed asphalt plant to residential and commercial building receptor locations in the vicinity of the Newport Materials project site.

For the receptor residential and commercial properties evaluated in our reports prior to 2015, using an 8-foot above grade acoustic center for the plant was technically appropriate and reasonable, because the large horizontal distances between the proposed plant location and any/all residences surrounding the project site were the principal attenuation (noise reduction) factors in the acoustical evaluation.

Scope / Current Evaluation

The recent Land Court Decision stipulates that the receptor location of concern in this matter is the western property line of the Newport Materials property, which demises the Newport Materials property and the adjacent Fletcher Quarry industrial rock quarry property. We have conservatively extended the Land Court receptor-of-concern property line location to apply to any/all locations on the Fletcher Quarry property beyond the property line.

In our recent January 2015 reports, CTA evaluated asphalt plant sound transmitted to the Newport Materials western property line, in accordance with the Land Court Decision. The January 2015 report evaluations were conducted using laser-imaging-derived topographical data for the portion of the Fletcher Quarry property in the vicinity of the Newport Materials proposed asphalt plant location, which was provided at our request during December 2014 by LandTech, Inc. (civil engineering/survey firm retained by Newport Materials).

The laser-imaging topographic data quantified the elevation contours of a hillside located on the Fletcher Quarry industrial property, which overlooks the Newport Materials property. The laser-imaging topographic data was not available in 2009.

The fundamental conclusion of the January 2015 reports is:

- If the Town of Westford Planning Board would decide that sound produced by the asphalt plant and transmitted to the adjacent industrial rock quarry property must comply with Town of Westford acoustical criteria, a large sound barrier wall could be constructed on Newport Materials property to achieve compliance with the criteria.

In the course of the recent 2015 CTA evaluations of proposed asphalt plant sound transmitted to the Newport Materials western property line (and the Fletcher Quarry hillside beyond), the Peer Reviewer has noted that asphalt plants include sound sources that are located at elevations higher than the 8-feet above grade acoustic center that has been used in the CTA acoustical computer model evaluations for this project.

The Peer Reviewer has recently requested an evaluation of proposed asphalt plant sound sources that would be located at elevations higher than 8-feet above grade. The Peer Reviewer also recently requested consideration of at/near sound source noise control treatments, and preparation and submittal of a revised CADNA acoustical-projections computer model.

This supplemental report presents CTA's revised evaluation submittal in accordance with the Peer Review request.

For this current report, we contacted Gencor to obtain information on Gencor 400 Ton Skidded Ultraplant sound sources that would be located at elevations higher than 8-feet above grade.

Appendix A contains two copies of an isometric-view drawing of a Gencor 400 Ton Skidded Ultraplant, recently provided to us by Gencor for this report evaluation. We have annotated one of the drawings to show the locations of three separate metal panel sound barriers that we have developed for this report in accordance with the Peer Reviewer request. As shown on the annotated drawing, one high-elevation barrier is proposed for the top of the silo cluster, and two at-grade barriers are proposed for the dryer drum/blower and baghouse areas of the asphalt plant, respectively, as further discussed below.

The Gencor drawings identify the locations of, and elevations above grade of, and horsepower ratings of, all the motors that would be located at elevations higher than 8-feet above grade at the Newport Materials project site. For this report evaluation, we have calculated sound that would be produced by these motors in accordance with methodology prescribed in the Edison Electric Institute Power Plant Environmental Noise Guide, which is a standard reference for electric motor sound level calculations.

We note that some sound would be produced by other miscellaneous sound sources at elevations at/near grade and higher than 8-feet above grade, which are not identified in text on the isometric drawings in Appendix A (for example, conveyer slats and gear drives or bearings that are enclosed in the "Blue Smoke" system, some small fans, the casing of the upper end of the drying drum, the discharge outlet of the large duct silencer that we have recommended for the baghouse exhaust fan since our very first report in 2009, etc.).

However, we believe that the miscellaneous other sound sources for which acoustical information are not available would only contribute a small fraction of the overall sound energy produced by the plant. This fractional increase in the overall sound energy would result in a statistically un-measureable increase in predicted sound levels at, or beyond, the west property line. We believe that this current evaluation report, which includes the motor sound sources at the elevations shown and described on the isometric drawings in Appendix A in accordance with the Peer Reviewer request, is the best that can be provided based on currently-available acoustical information for this project.

It is important to note that all of our previous reports also evaluated sound produced by the asphalt plant motors; however this current report (and CADNA file data submitted with this report) refines the computer modelling results using the elevations-above-grade data shown on the Gencor isometric drawings.

Calculations

Appendix B contains pertinent table-format and graphic-format results of our calculations. For this current evaluation, we have refined our previous point-source location of the "acoustic center" of the entire plant at an elevation of 8-feet above grade. We have sub-divided and

individually evaluated the two principal ground-mounted sources (the dryer drum/blower area, and the baghouse area) and have conservatively applied a 2-decibel attenuation factor to these two sources, which would be associated with the recommended silencers on the combustion blower and baghouse exhaust fan. In addition, we have individually and collectively evaluated each of the higher-elevation motors that are shown in Appendix A.

Appendix B, Table 1 presents our current projections of sound levels that would be transmitted to the Newport Materials western property line, and transmitted beyond the property line to the Fletcher Quarry property. Table 1 evaluates the predicted sound pressure levels of the at-grade and upper elevation plant sound sources individually, and collectively.

Appendix B, Figure 1 presents sound levels generated by the entire plant during full-operation conditions and transmitted to representative locations along the Newport Materials western property line and Fletcher Quarry hillside beyond the property line. These projections include the attenuation factors (noise reduction performance) of the two silencers, three near-source acoustical panel barrier assemblies, and the 35-foot tall, 1200-foot long sound barrier wall near the property line.

It is important to note that all of the current asphalt plant sound level projections indicate sound levels below 53 dBA at all receptor locations along and beyond the Newport Materials western property line.

It is also important to note our calculations indicate the total combined sound level contribution of all of the motor sound sources located more than 8-feet above grade is 10 decibels lower than the sound level contribution of the entire plant, which we had determined in all of our previous computer model evaluations in this matter.

In simple non-decibel explanation, the total sound energy contribution of all of the motors that would be located more than 8-feet above grade is just 10% of the overall sound energy of the entire asphalt plant, and results in less than a fractional increase in predicted decibel sound levels at or beyond the property line.

On Table 1, the motors are listed from the highest-elevation motor height, descending to the lowest elevation motor height, for all the motors that would be located at elevations higher than 8-feet above grade. It is important to note that the first three listed motor elevations are higher than the top of the 35-foot tall sound barrier wall that has been proposed and discussed in recent (2015) CTA reports.

For this reason, this current report presents a specific design concept to construct a 3-sided metal panel sound barrier wall atop the loading silo cluster, which would shield all the motor sources that are located higher than the elevation of the top of the 35-foot tall sound barrier wall, which has recently (January 2015) been proposed to be constructed near the Newport Materials western property line.

In addition, to ensure sound pressure levels are below 53 dBA at all receptor locations along or beyond the Newport Materials western property line, this current report presents specific design

concepts to construct two additional 3-sided metal panel sound barrier wall assemblies, one adjacent to the dryer drum/blower area and one adjacent to the baghouse area.

We note that our previous 2009 report that included the Noise Form submittal approved by MassDEP also included a brief discussion of and presented product literature for potential top-of-silo and at-grade sound barriers constructed with metal acoustical panels.

Appendix A includes a second copy of the Gencor isometric drawing, which we have annotated to conceptually illustrate the layout of the metal panel sound barrier assemblies.

- The recommended metal panel sound barrier product for each of the three near-source barrier assemblies shown in Appendix A is Empire Acoustical Silent Screen Panels, or equal. Appendix C contains product literature for the Silent Screen panels.

- The top height of the metal panel barrier wall atop the loading silo cluster is recommended to be at an elevation that is 2-feet higher than the top height of the slat drive conveyer motor, which is the highest-elevation motor located on the loading silo cluster.

- The top heights of the at-grade metal panel barrier walls adjacent to the dryer blower and baghouse areas are recommended to be 15-feet above grade.

Appendix C is directly copied from one of our 2009 reports, which contained the MassDEP Noise Form submittal prepared by CTA, and which was approved by MassDEP. Appendix C contains illustrations and specifications for noise control products that we recommended in 2009, including the Empire Acoustical Silent Screen Panels that are also discussed in this current report. Appendix C also contains product literature for the recommended combustion blower and baghouse silencers.

Conclusions

The recent Land Court Decision stipulates that the background sound level at the Newport Materials western property line is 43 dBA.

The Town of Westford acoustical criteria for a Major Commercial Project includes a criterion requiring that sound produced by a facility must not result in a sound level at the receptor property line that is more than 70 dBA, or 10 dBA above the background sound level, whichever is lower.

Therefore, in the event that the Town of Westford would require compliance with the Major Commercial Project most-stringent acoustical criterion "not to exceed 10 dBA above background", the sound level limit applicable at the Newport Materials western property line is 53 dBA.

The conclusion of this current report (and attached revised CADNA computer model electronic file to be forwarded to the Peer Reviewer) is that with the current-design noise control (as of this report date):

- All sound produced simultaneously from all asphalt plant sound sources operating during full plant operations at all elevations above grade would result in sound levels of **less than 53 dBA** at all locations along the Newport Materials western property line, and at all locations and at all elevations on the Fletcher Quarry industrial rock quarry property, which is located to the west of the Newport Materials western property line.

- The CTA refined noise control design response in accordance with the Peer Reviewer request has resulted in current projections of sound levels that are lower (better) than previous projections, and which indicate acoustical compliance with the most-stringent applicable acoustical criteria of the Town of Westford, at the compliance location stipulated in the Land Court Decision (and beyond).

We note that the sole purpose of the design development of the 35-feet tall sound barrier wall near the Newport Materials western property line discussed in our January 2015 report, and the design concept development of the three metal panel sound barrier assemblies discussed in this current report, is to demonstrate that it is possible to attenuate proposed Newport Materials asphalt plant sound levels transmitted to the adjacent Fletcher Quarry industrial property, sufficient to achieve compliance with the most stringent Town of Westford acoustical criteria, regardless of whether or not any persons would be acoustically "protected" by the sound barriers.

- None of the sound barriers discussed in CTA January and March 2015 reports would provide any perceptible acoustical benefit to any Town of Westford or Town of Chelmsford residences or commercial buildings.

- None of the sound barriers discussed in CTA January and March 2015 reports would be required to achieve compliance with Town of Westford or Town of Chelmsford or MassDEP acoustical criteria at any residences or commercial buildings.

If we can provide any further information or answer any questions regarding this letter report, please do not hesitate to contact us. Thank you.

Sincerely,
CAVANAUGH TOCCI ASSOCIATES, INC.

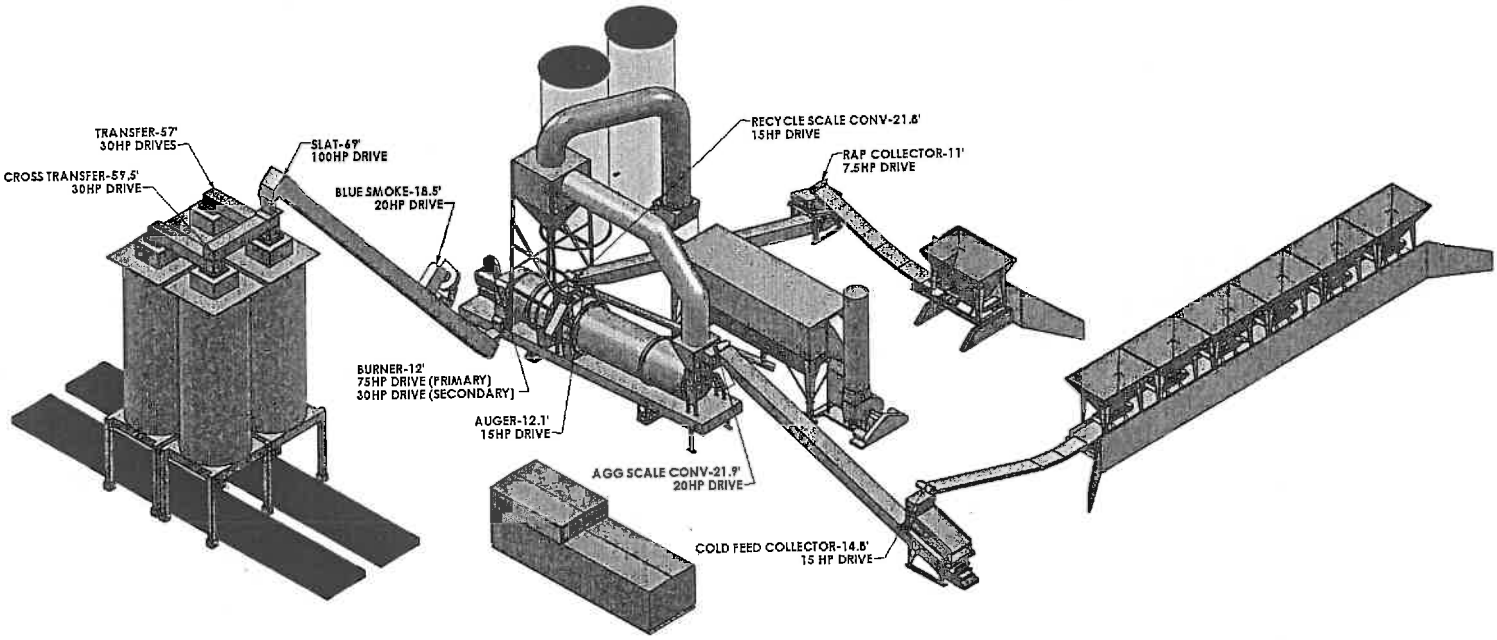
Brion G. Koning

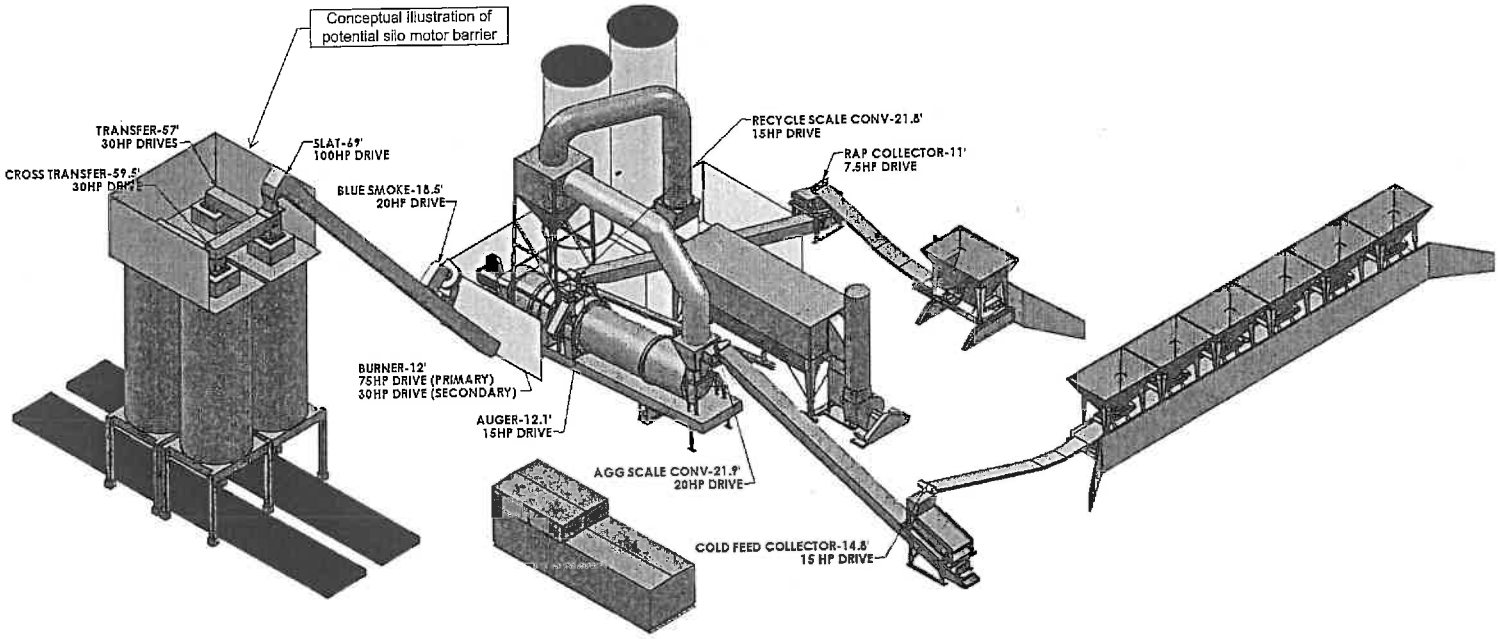
Brion G. Koning, Senior Consultant

S:\Projects\2014\14342 - Newport Materials\Deliverables\Reports\March 2015\14342-NewportMaterialsElevatedSoundSources-3-10-2015.docx

APPENDIX A

Gencor Industries Drawings


TRANSFER-57'
30HP DRIVES
SLAT-69'
100HP DRIVE
CROSS TRANSFER-59.5'
30HP DRIVE
BLUE SMOKE-18.5'
20HP DRIVE
RECYCLE SCALE CONV-21.8'
15HP DRIVE
RAP COLLECTOR-11'
7.5HP DRIVE
BURNER-12'
75HP DRIVE (PRIMARY)
30HP DRIVE (SECONDARY)
AUGER-12.1'
15HP DRIVE
AGG SCALE CONV-21.9'
20HP DRIVE
COLD FEED COLLECTOR-14.8'
15 HP DRIVE


Conceptual illustration of potential silo motor barrier
TRANSFER-57'
30HP DRIVES
SLAT-69'
100HP DRIVE
CROSS TRANSFER-59.5'
30HP DRIVE
BLUE SMOKE-18.5'
20HP DRIVE
RECYCLE SCALE CONV-21.8'
15HP DRIVE
RAP COLLECTOR-11'
7.5HP DRIVE
BURNER-12'
75HP DRIVE (PRIMARY)
30HP DRIVE (SECONDARY)
AUGER-12.1'
15HP DRIVE
AGG SCALE CONV-21.9'
20HP DRIVE
COLD FEED COLLECTOR-14.8'
15 HP DRIVE

APPENDIX B

Output Summaries of Acoustical Calculations
Pertaining to Elevated Asphalt Plant Sound Sources
Conducted for CTA Report Dated March 4, 2015

cta

Table 1. Acoustical Evaluation of Proposed Asphalt Plant Sound Sources to be Located at Elevations Higher than 8-Feet Above Grade

Component Name/ID	Motor Horsepower	Motor RPM	Elevation Above Grade (feet)	Distance from West Property Line (feet)	Sound Pressure Level at Property Line (dBA) ** without any sound control	Recommended Noise Control At/Near Source *** with property line sound wall	Approximate Extent of Noise Reduction	Resultant Sound Level At Property Line
Conveyer Drive Motor *	100	1800	69	142	57	3-sided barrier atop loading silo	31	26
Cross Transfer Motor - Lane 1 *	30	1800	59	125	52	3-sided barrier atop loading silo	26	26
Cross Transfer Motor - Lane 2 *	30	1800	59	138	53	3-sided barrier atop loading silo	34	19
Recycle Scale Conveyer Motor	15	1800	22	159	49	(property line sound wall)	28	21
Agg Scale Conveyer Motor	20	1800	22	192	49	(property line sound wall)	28	21
Blue Smoke Motor	20	1800	19	145	51	(property line sound wall)	28	23
Cold Feed Collector Motor	15	1800	15	197	47	(property line sound wall)	28	19
Burner Drive Primary	75	1800	12	148	57	(property line sound wall)	33	24
Burner Drive Secondary	30	1800	12	148	53	(property line sound wall)	33	20
Auger Motor	15	1800	12	160	49	(property line sound wall)	28	21
RAP Collector Motor	7.5	1800	11	180	45	(property line sound wall)	28	17
Combustion blower and drum	N/A[2]	N/A[2]	8	133	73	3-sided barrier at grade, blower silencer	30	43
Baghouse exhaust fan	N/A[2]	N/A[2]	8	152	72	3-sided barrier at grade, baghouse silencer	31	41
Total All Sources Simultaneously					76			45

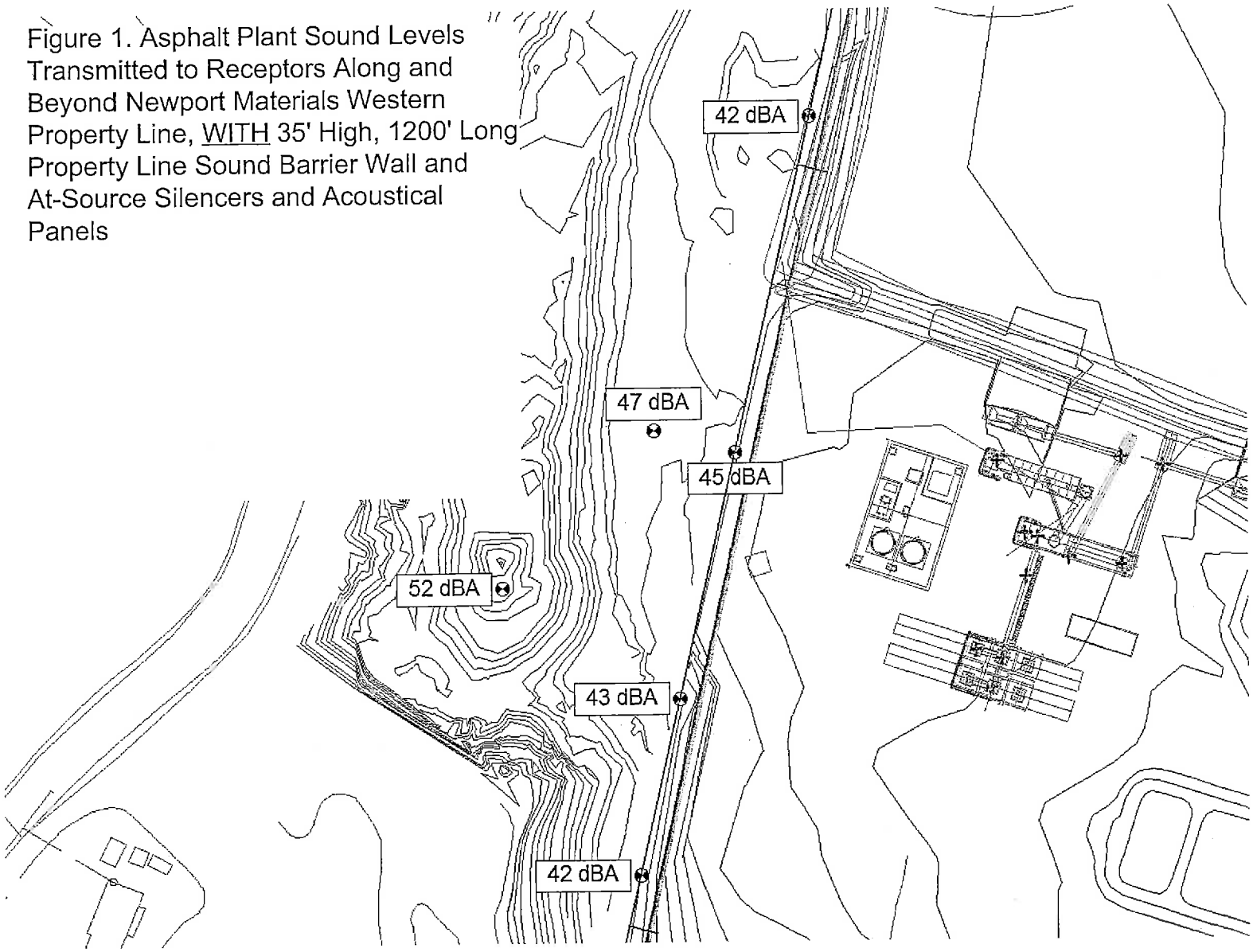
* These first three listed sources would be located at elevations that are higher than the proposed 35-feet tall sound barrier wall near the western Newport Materials property line

** Sound source levels calculated using methodology of Electric Power Plant Environmental Noise Guide

** Sound pressure levels conservatively calculated based on geometrical spreading to property line in horizontal axis, no favorable adjustment for diagonal distance, or shielding at/near source, etc.

*** As presented in concept in CTA report dated June 12, 2009 (Empire Acoustical Silent Screen sound barrier panels) and supplemented in more detail in CTA report dated March 10, 2015

Figure 1. Asphalt Plant Sound Levels Transmitted to Receptors Along and Beyond Newport Materials Western Property Line, WITH 35' High, 1200' Long Property Line Sound Barrier Wall and At-Source Silencers and Acoustical Panels



APPENDIX C

Noise Control Product Literature
(Copy of Appendix C from CTA June 2009 report)

Vibro-Acoustics®

SS1

RD/CD

RECTANGULAR AND CIRCULAR

SILENCER SHEETS

DESCRIPTION

Vibro-Acoustics' RD and CD silencers use acoustic grade glass fiber as the principal sound-absorbing mechanism. Rectangular models utilize acoustical splitters, sometimes called baffles, for broad-band attenuation. Perforated metal protects the glass fiber from erosion by the airflow. Similarly circular models have acoustical center-bodies, sometimes referred to as pods. They also incorporate glass fiber external to the duct connection size.

Splitters in rectangular models vary in quantity and thickness, and air passages also vary in size. Circular models vary in centerbody diameter, air passage width and external body dimension. The splitters and centerbodies are aerodynamically shaped to minimize pressure drop.

MODEL NAMES

Vibro-Acoustics' silencer model names are coded to help identify their recommended application range.

Rectangular

RD - — - —

SILENCER TYPE

VELOCITY RANGE
ULV, LV, MV, HV

FREQUENCY INDICATOR*
F1, F2, F3, F4, F5,
F6, F7, F8, F9

Circular

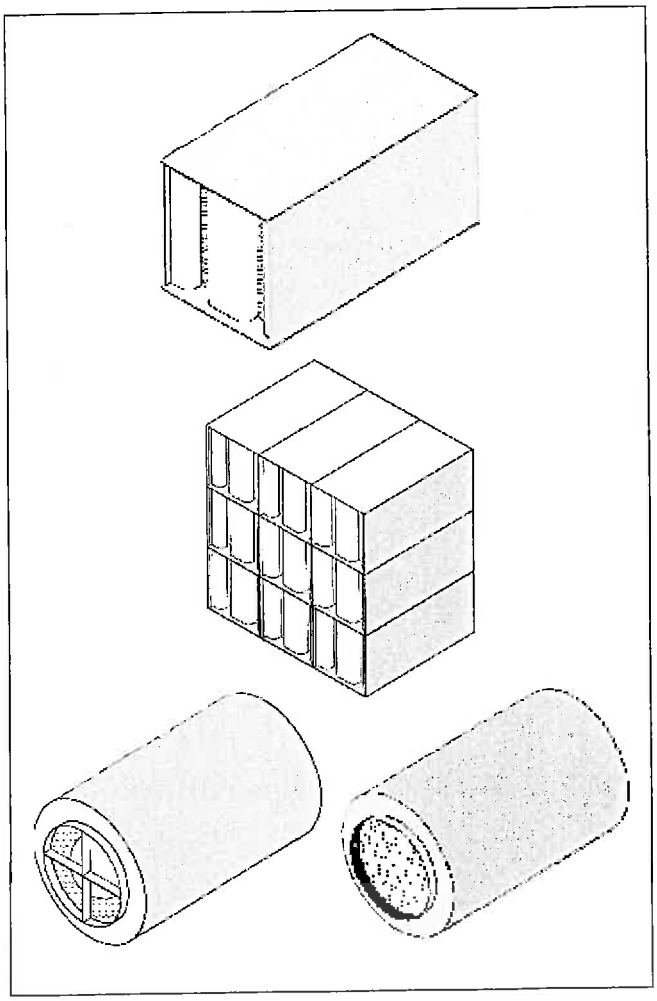
CD - — - —

SILENCER TYPE

VELOCITY RANGE
LV, MV, HV, UHV

FREQUENCY INDICATOR*
F1, F2

*The lower the Frequency Indicator, the better the silencer's insertion loss in the low frequency range. The higher the Frequency Indicator, the better the silencer's insertion loss in the mid to high frequency ranges.



APPLICATION

- in supply, return and exhaust ductwork
- in fan plenums and air handling units (both supply and return)
- on cooling towers, air-cooled chillers, etc.
- on the receiver side of valves, dampers, terminal boxes, etc.
- economical substitution for acoustically lined duct (see SAS 10)

- normal recommended duct velocity range

RD-ULV	0-500 fpm		
RD-LV	0-750 fpm	CD-LV	0-1500 fpm
RD-MV	750-1250 fpm	CD-MV	1500-3000 fpm
RD-HV	1250-2000 fpm	CD-HV	3000-5000 fpm
		CD-UHV	5000-7000 fpm

For velocities in excess of the RD-HV range see the EX Model and RLP Silencers (SS8 and SS9).

SILENCER SHEETS

FEATURES AND BENEFITS

- ◆ available in any cross-sectional dimensions to "fit-the-duct"
- ◆ modular unit sizes to fit ducts and air handling units without using transitions or large blank-off sections
- ◆ standard rectangular silencer lengths available in 36, 60, 84 and 108"; custom lengths up to 144" at no cost premium
- ◆ can be selected to suit the acoustic, space, or energy-cost requirements
- ◆ construction quality and aerodynamic design optimized to give reliable performance, best acoustics, lowest pressure drop and lowest overall cost
- ◆ splitters can be aligned vertically or horizontally to minimize extra pressure losses due to poor inlet or discharge flow conditions e.g. near fans, elbows, etc.

CAUTIONS / WHEN NOT TO USE RD AND CD SILENCERS

- ◆ when 3-5 equivalent duct diameters of straight, unobstructed duct are not available on both the silencer's inlet or discharge; consider using Elbow Silencers (SS5), Transitional Silencers (SS6) or Fan Silencers (SS10 and SS11)
- ◆ when velocities exceed 2000fpm for RD silencers; see RLP Silencers (SS9) or EX Silencers (SS8)
- ◆ when acoustical media in the airstream is of concern; see Film Lined Silencers (SS2) and No-Media Silencers (SS3)
- ◆ when break-out noise is of prime concern RD and CD silencers may be appropriate selections. They may require mass/stiffness added to their outer casing (see HTL Silencers (SS7) and refer to the Selection/Specification Section for proper silencer location)

PERFORMANCE DATA / TESTING

See Performance Data section.

Vibro-Acoustics' 4th generation aero-acoustic laboratory was the first laboratory to be NVLAP accredited for the ASTM E-477 silencer test code. NVLAP is administered by the U.S. Dept. of Commerce. See the Corporate/ Laboratory Section.

SILENCER SELECTION AND LOCATION

Vibro-Acoustics offers multiple selection methods, from Vibro-Acoustics' Full-Service complete analysis to Do-It-Yourself quick selections. See the Selection/ Specification Section for details.

STANDARD CONSTRUCTION FEATURES

RD

- ◆ galvanized, lockformed casing constructed to SMACNA standards
- ◆ 1" slip connection at each end
- ◆ aerodynamically shaped, galvanized nose at inlet
- ◆ galvanized gap plates between splitters to ensure close dimensional tolerances at air passages
- ◆ perforated galvanized splitters complete with perforated diffuser tail sections
- ◆ splitters filled with acoustic grade glass fiber under minimum 15% compression

CD

- ◆ galvanized, lockformed casings for class I construction
- ◆ galvanized or prime painted mild steel, stitchwelded and sealed casings for class II construction
- ◆ prime painted, mild steel continuously welded casings for class III construction
- ◆ 2" slip connection at each end
- ◆ centerbody "bullet" centered and supported in airstream by steel struts
- ◆ centerbodies have either spun aerodynamic noses or truncated nose cones
- ◆ centerbodies have perforated diffuser tail sections
- ◆ casing and centerbodies filled with acoustic grade glass fiber under minimum 15% compression

SPECIAL CONSTRUCTION OPTIONS

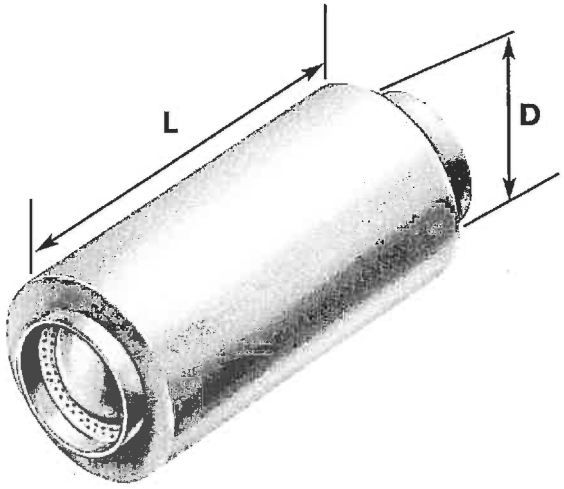
- ◆ heavier gauge casings and perforated metal
- ◆ continuously welded casings
- ◆ special materials e.g. stainless steel, aluminum
- ◆ flanges
- ◆ access doors
- ◆ media protection: glass fiber cloth, film liner
- ◆ high transmission loss (HTL) casings to prevent break-out/break-in noise
- ◆ built in transitions
- ◆ removable splitters
- ◆ flow measuring stations
- ◆ for details of above and more special options see Special Construction Options (pg. 3.33 to pg. 3.37).

TO SPECIFY

See example specification located in the Selection/

LOW FREQUENCY CONIC-FLOW SILENCERS TYPE: FCS

with FORWARD and REVERSE FLOW Ratings



IAC has produced Quiet-Duct HVAC silencers for more than 50 years, and has developed many of the terms and test standards for rating silencer performance that are used today. These standards are dynamic documents that continue to change based on new developments and discoveries in the field of acoustic engineering. Today we continue our involvement in several of the industry's governing agencies, and we remain committed to ensuring that we are always providing product that is in accordance with all of the latest standards. All published acoustic and aerodynamic performance results are based on tests conducted in strict accordance with ASTM E477-99 in IAC America's NVLAP-Accredited laboratory.

DESIGNATING A SILENCER

Model: 12 FCS 36

Diameter: 12" Type: FCS Length: 36"

Table I. Dynamic Insertion Loss (DIL) Ratings: Forward (+) / Reverse (-) Flow

IAC MODEL	Octave Band	1	2	3	4	5	6	7	8
	Hz	63	125	250	500	1K	2K	4K	8K
	Face Velocity, fpm								
	-4,000	10	18	29	42	40	35	31	21
	-2,000	10	17	27	39	38	35	32	26
12FCS	0	10	16	26	36	36	36	33	26
	2,000	9	14	24	33	34	37	34	27
	4,000	8	12	22	29	33	39	35	27
	-4,000	10	18	31	41	42	35	21	15
	-2,000	10	16	29	38	40	35	22	17
24FCS	0	9	15	27	36	38	36	22	18
	2,000	8	13	25	32	37	35	23	19
	4,000	7	12	23	29	35	35	23	20
	-4,000	12	21	35	41	40	27	19	14
	-2,000	11	20	33	38	39	27	21	14
36FCS	0	10	18	31	37	38	27	22	15
	2,000	9	16	29	35	36	28	23	16
	4,000	8	14	27	33	34	28	24	17
	-4,000	15	25	39	41	37	23	15	11
	-2,000	13	22	37	39	36	23	17	12
48FCS	0	12	20	35	37	36	24	19	16
	2,000	10	18	33	35	35	24	20	16
	4,000	9	16	30	34	35	25	21	17
	-4,000	18	30	43	41	35	16	12	10
	-2,000	16	27	41	40	34	17	13	11
60FCS	0	14	25	39	39	33	19	15	13
	2,000	12	22	37	37	33	20	16	15
	4,000	10	20	34	35	33	22	18	16

NVLAP®

(+) Forward Flow / (-) Reverse Flow. Aero-acoustic performance data based on NVLAP accredited laboratory tests conducted in strict accordance with ASTM E477-99. Contact IAC if attenuation in excess of 50 dB is required.

Table II: Weights and Measures

Model	Duct Dia., in. / Silencer L, in.	12 / 36	14 / 36	16 / 36	18 / 36	20 / 40	22 / 44	24 / 48	26 / 52
FCS	Weight, lb.	99	111	132	149	168	188	208	234

Model	Duct Dia., in. / Silencer L, in.	28 / 56	30 / 60	32 / 64	36 / 72	40 / 80	44 / 88	48 / 96	60 / 120
FCS	Weight, lb.	255	374	495	600	746	951	1140	1873

Table III: Aerodynamic Performance

Model	L/ Ft	Static Pressure Drop, i.w.g.														
FCS	All Sizes	0.04	0.06	0.07	0.10	0.12	0.15	0.19	0.22	0.26	0.30	0.34	0.39	0.44	0.50	0.55	0.61
Silencer Face Velocity, fpm		1000	1200	1400	1600	1800	2000	2200	2400	2600	2800	3000	3200	3400	3600	3800	4000

Table IV: Self-Noise Power Levels, dB re: 10-12 Watts

IAC Model	Octave Band	1	2	3	4	5	6	7	8
	Hz	63	125	250	500	1K	2K	4K	8K
	Silencer Face Velocity, fpm								
FCS All Sizes	-3,000	57	58	58	57	56	57	56	52
	-2,000	50	49	51	49	46	47	45	39
	-1,000	38	34	39	35	29	30	26	20
	1,000	44	43	37	37	38	38	20	20
	2,000	56	54	50	50	50	50	41	31
	3,000	63	60	57	57	57	57	53	47

(+) Forward Flow / (-) Reverse Flow. Aero-acoustic performance data based on NVLAP accredited laboratory tests conducted in strict accordance with ASTM E477-99.

TAKE NOTE!

- Silencer Face Area is the cross-sectional area at the silencer entrance.
- Face Velocity is the CFM of airflow divided by the Face Area (in sq. ft.)
- Pressure Drop for any velocity can be calculated from this equation:
  $PD = (\text{Actual FV/Catalog FV})^2 \times (\text{Catalog PD})$
- Self Noise values shown are for a four-square-foot face area silencer.
- For each doubling of the face area add 3 dB to the self-noise values listed.
- For each halving of the face area subtract 3 dB from the self-noise values listed.
- Weights and measures are listed for limited number of available sizes.

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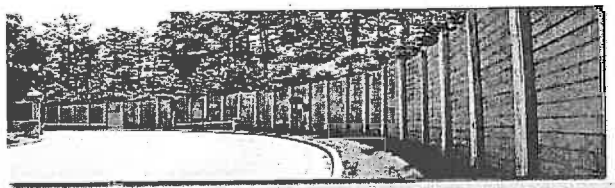

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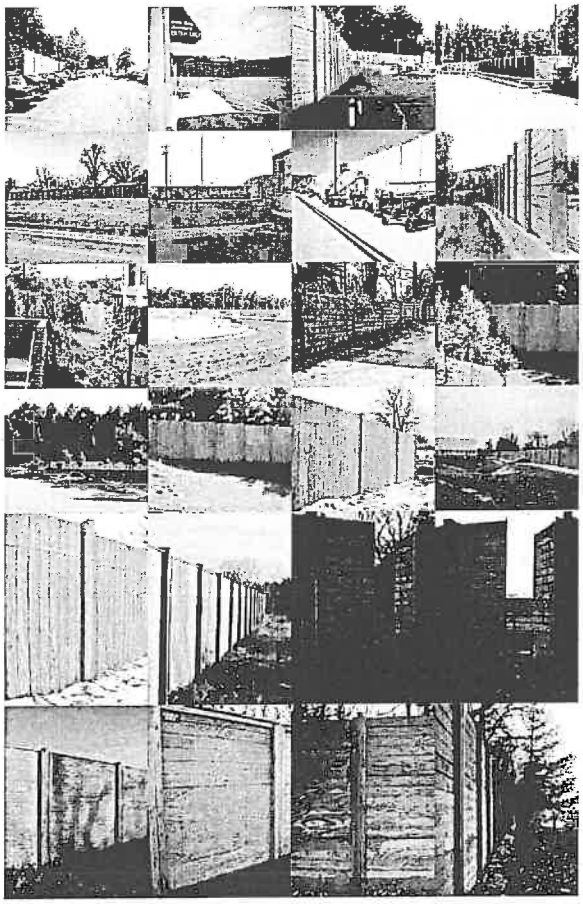

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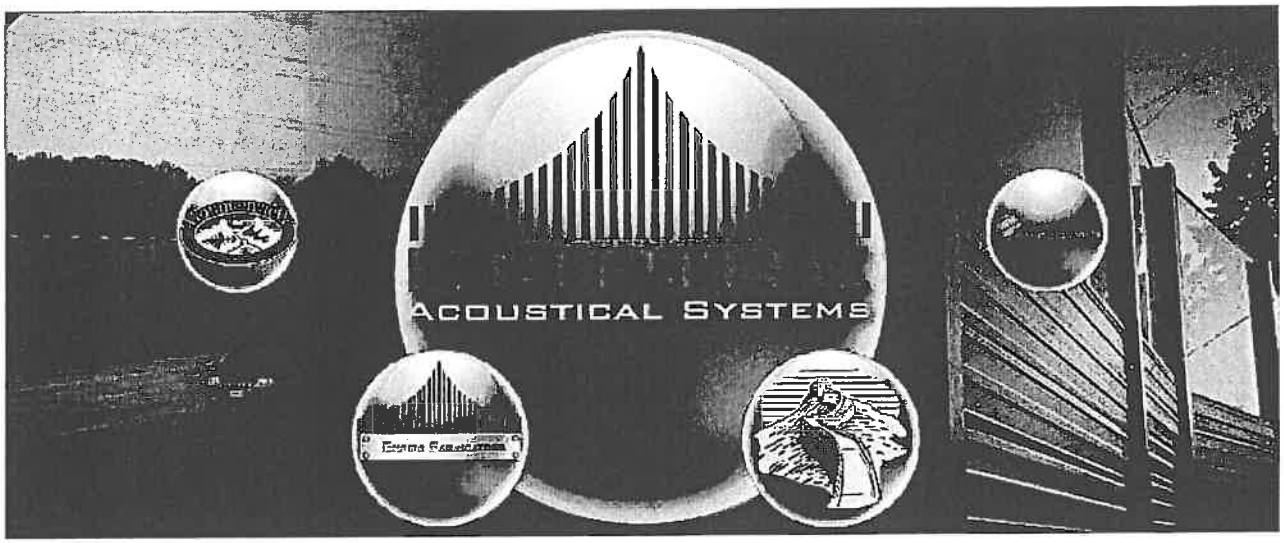
Page 1 ... Page 2



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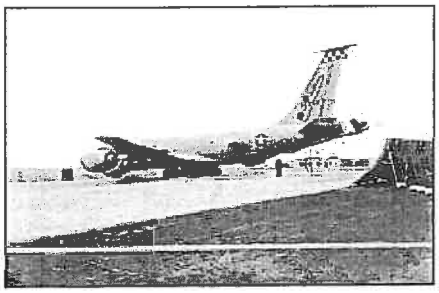

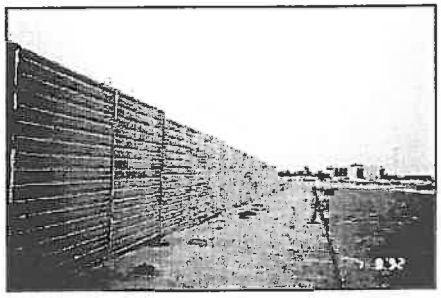

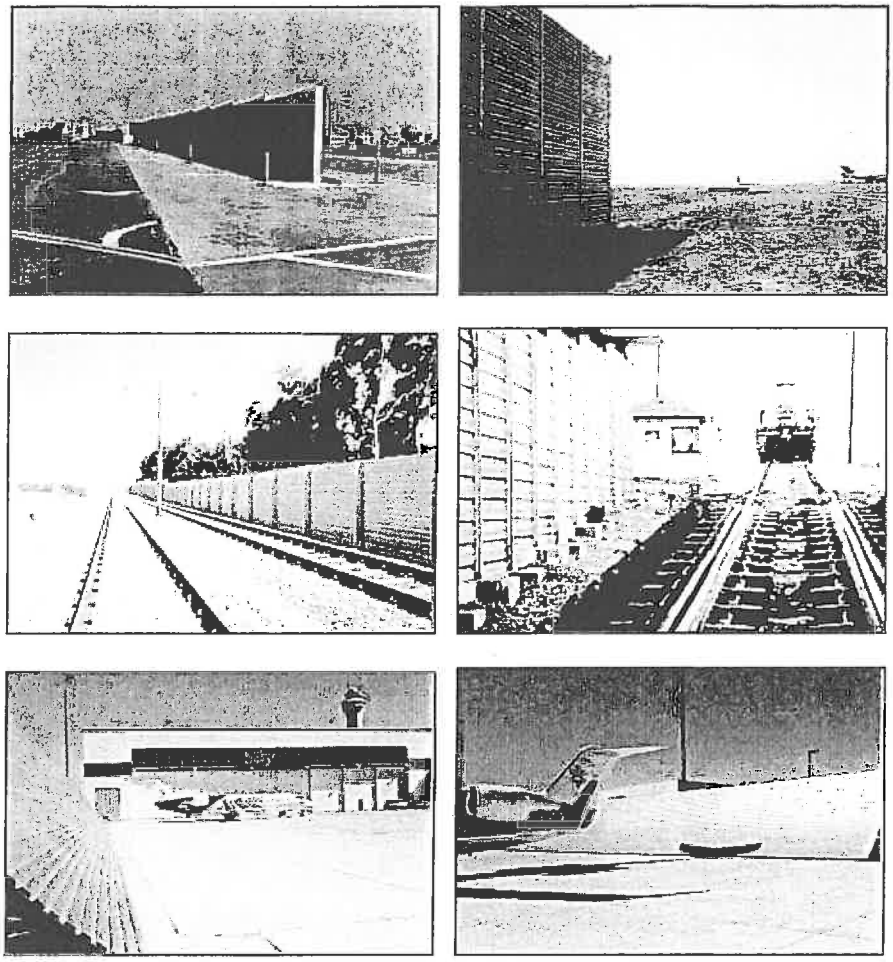

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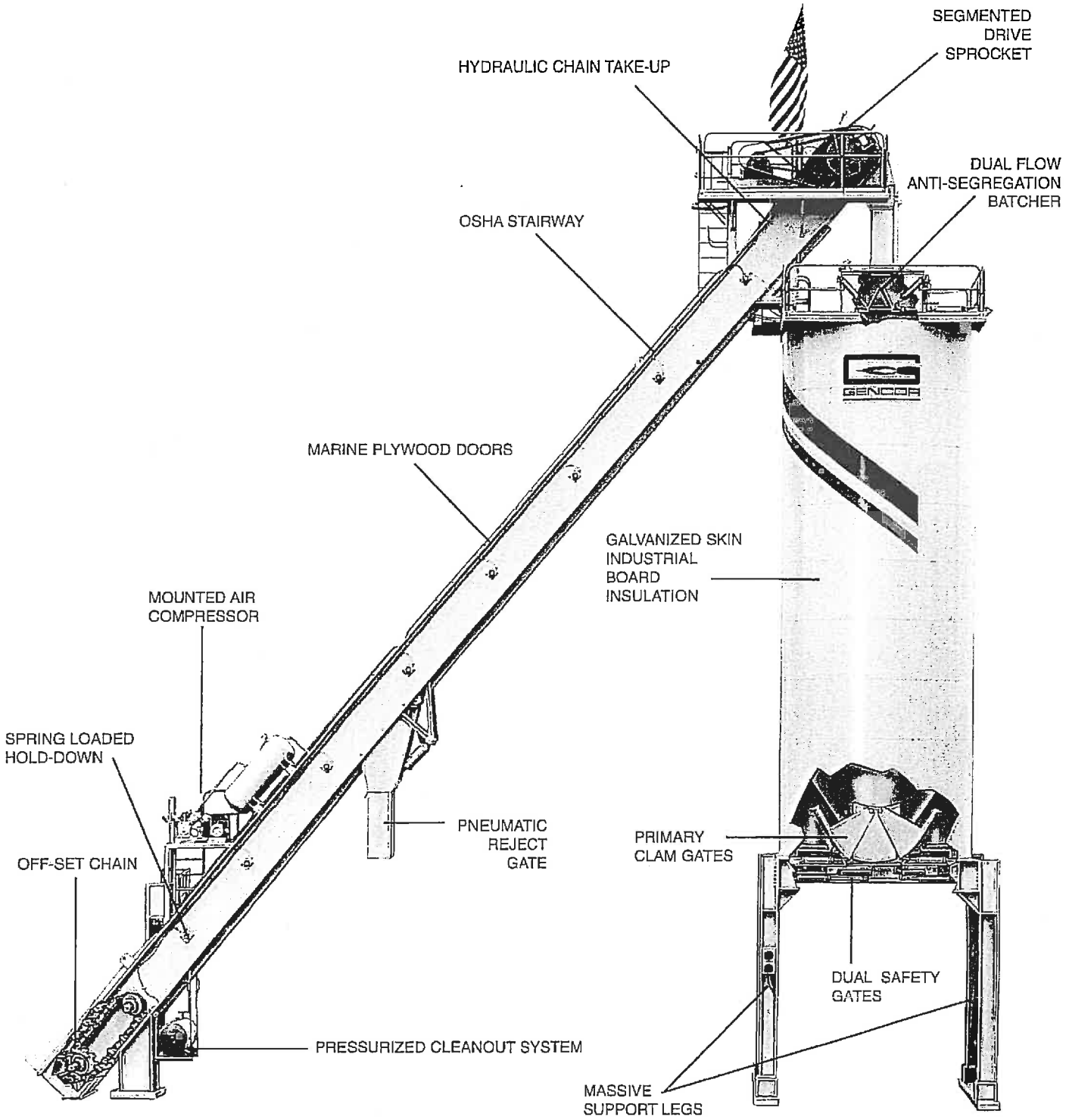

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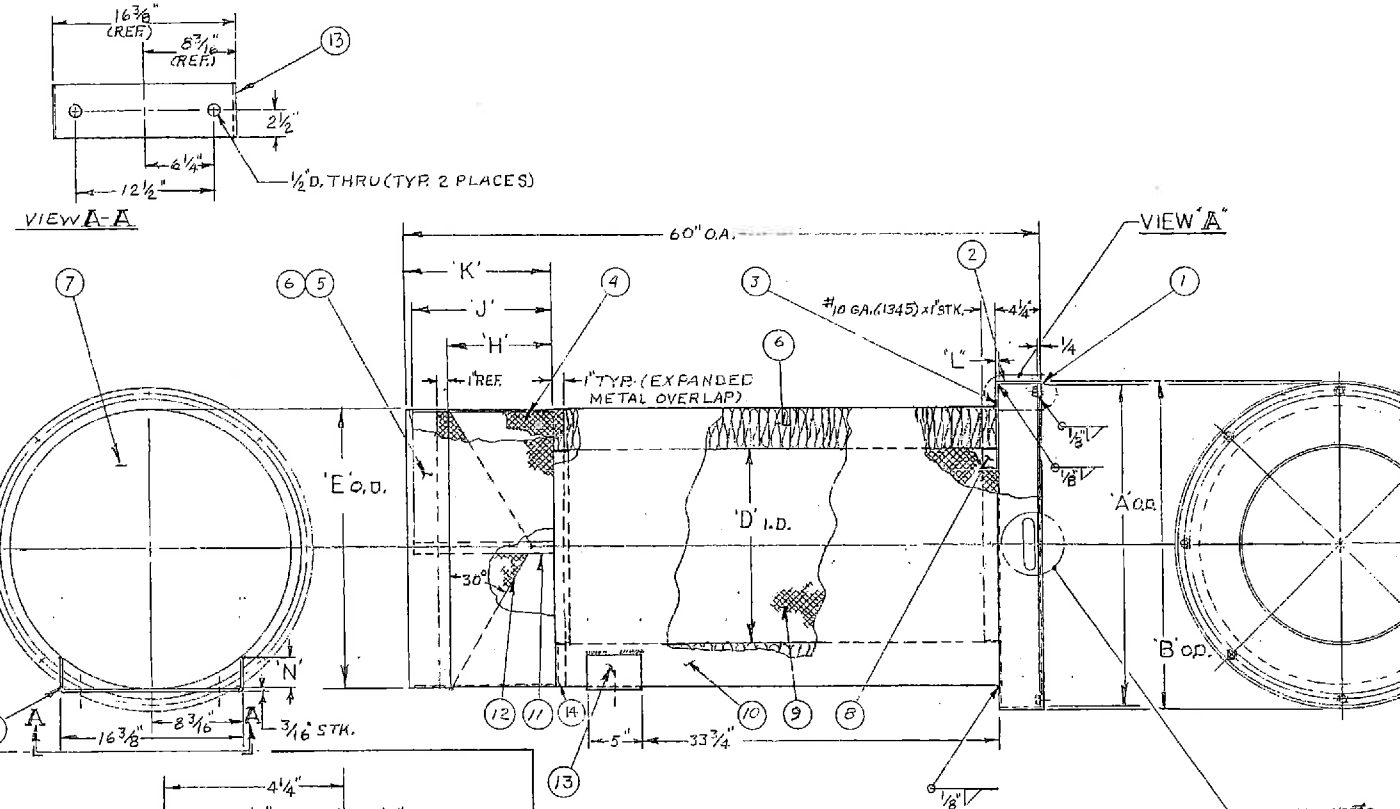
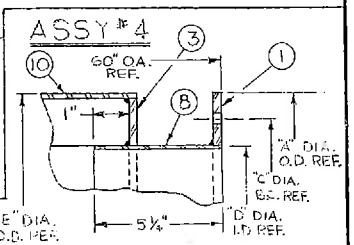


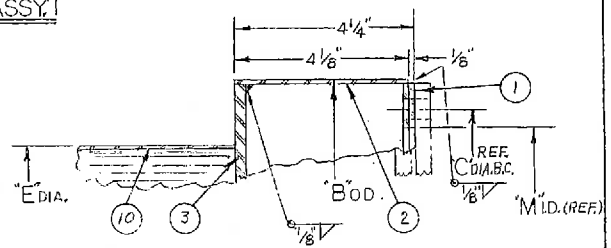
ITEM	DESCRIPTION		
1	MTG. FLANGE		
2	BAND / ADAPTER	SIZE 25, 75, 160 & 125 ONLY	
3	FLANGE / ADAPTER		
4	EXPANDED METAL 1/2 #18		
5	OUTER BAND		
6	#48 INSULATION		
7	END COVER		
8	BAND. (PERFOR. MET. RETAIN.		
9	PERFORATED METAL		
10	OUTER CASING		
11	END TRUSS		
12	CONE / PERFOR. METAL		
13	CRADLE		
14	INSULATION RETAINING FLNG.		
15	RIVETS		

ASSY #4



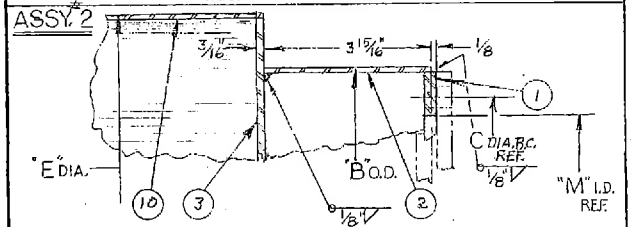
VIEW A - TO BE USED ON AF BURNERS WITH DISCHARGE DAMPERS ONLY

ASSY #1



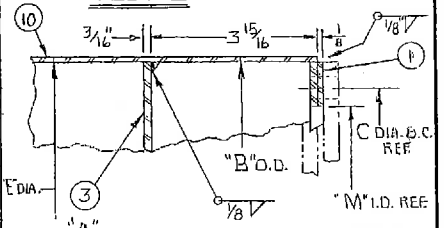
VIEW A - SCALE 1/2" = 1" - SHOWING ASSEMBLY OF 4 1/8" WIDE BAND WHERE "E" DIA. IS SMALLER THAN "B" DIA.

ASSY #2



VIEW A - SCALE 1/2" = 1" - SHOWING ASSEMBLY OF 3 7/8 WIDE BAND WHERE "E" DIA. IS LARGER THAN "B" DIA.

ASSY #3



VIEW "A" SCALE 1/2" = 1" - SHOWING ASSEMBLY OF ITEM 10 WHERE "E" DIA. IS THE SAME AS "B" DIA.

TABULATION BLOCK

PART NO	SIZE	A	B	C	D	E	H	J	K	L	M	N	TYPE ASSY.
609-86-0002	AF-25	18"	18 3/8"	16 3/4"	13 1/2"	21 1/2"	10"	13 1/4"	14"	3/16"	15 3/4"	3 31/32"	ASSY. #2 OR 4
609-86-0003	AF-40	21 1/2"	21 11/16"	20 1/4"	13 1/2"	21 11/16"	10"	13 1/4"	14"	3/16"	19 1/4"	3 31/32"	ASSY. #2 OR 4
609-86-0004	AF-60	25"	25 3/16"	23 3/4"	17"	25 3/16"	10"	13 1/4"	14"	3/16"	22 3/4"	2 7/16"	ASSY. #3 OR 4
609-86-0005	AF-75	27 1/2"	27 7/8"	26 1/4"	18"	26"	10"	13 1/2"	14"	3/16"	25 1/4"	2 29/32"	ASSY. #1 OR 4
609-86-0006	AF-100	30 1/2"	30 7/8"	29 1/4"	18 3/8"	26 3/8"	10"	13 1/4"	14"	1/4"	28 1/4"	2 11/16"	ASSY. #1 OR 4
609-86-0007	AF-125	33 1/2"	33 7/8"	32 1/4"	22	30"	10"	13 1/4"	14"	1/4	31 1/4"	2 5/16"	ASSY. #1 OR 4

NOTES:
1. PROVIDE SLOTTED OPENING (AS REQ'D.) FOR DAMPER LINKAGE
2. CLEARANCE SLOT, OR SLOTS TO BE ADDED FOR ADJUSTABLE DAMPER LINKAGE AT 'MOCK BURNER ASSEMBLY.'

NO.	DESCRIPTION	BY	DATE	CHK'D
H	ADDED ITEM 15	RL	12 87	JC
G	ADDED ASSY #4	HS	4/24/87	RL
F	ARROWHEADS ON "B" & "E" TO O.D. ADDED ITEM 14	DDT	23 AUG 86	RL
E	"M" WAS (18 3/8 AF-25) 18 7/8 AF 40 (21 3/8 AF-60) 21 3/8 AF-75 (27 7/8 AF-100) 29 5/8 AF 125	RL	5/1/84	
D	CHG'D DESIGN ITEM 12 FOR AF 25, 75, 160 & 125 CHG'D DESIGN AF-40 & 60 TO ASSY #3	LJ	4-16-84	RL
C	ADDED NOTE 2	ERN	3/28-84	
B	AF-75: B WAS 23 3/4, C WAS 21 3/4, M WAS 23 3/4, N WAS 2 3/4" - WAS ASSY. STYLE 2	ERN	6/14-84	
A	ITEM 8 - STK #10 GA. 1" WAS 1/4" x 1 1/2 & ADD ITEM #13	ERN	3/15/82	TWP

REVISIONS

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NEXT ASSY | USED ON MINI GUARD

DRAWN BY E R N	DATE 2-22-82	SCALE NTS	
CH'D BY TGP	DATE 3-16-82	DRAWING NO. C-SG-0986	L
APP'D BY TWP	DATE 3-16-82		

SHT. 1

E POLYTRACE 036

Affidavit of Richard DeFelice

I, Richard DeFelice declare the following to be true under the penalties of perjury:

1. I am the owner/manager of Newport Materials, LLC and 540 Groton Road, LLC.
2. I have current applications before the Westford Planning Board and the Westford Zoning Board of Appeals for a Bituminous Concrete manufacturing facility (the "Facility") for the property located at 540 Groton Road (aka Commerce Way).
3. I will have five or more employees working at the Facility.
4. At a minimum the Facility will have the following employees:
    a. General scale house employee, who coordinates truck drivers, orders, and tickets.
    b. Facility operator who operates the mixers and calibrates requested formulas.
    c. Internal control operator who also works as a clerk/ office administrator.
    d. Two Yard personnel one that exclusively operates the loader, and another for general facilities management and operations/repairs.
    e. A Site Manager/controller.

Signed under the pains and penalties of perjury this 30th day of January 2015.

Richard DeFelice

D+F

FILE COPY

DESCHENES & FARRELL, P.C.
Attorneys at Law
515 Groton Road, Suite 204
Westford, MA 01886
Telephone: (978) 496-1177
Facsimile: (978) 577-6462

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Douglas C. Deschenes
Kathryn Lorah Farrell
*Melissa E. Robbins**

**Admitted in MA and NH*

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TOWN CLERK
WESTFORD

January 5, 2015

Town of Westford
Zoning Board of Appeals
55 Main Street
Westford, MA 01886

RE: 540 Groton Road; Variance/Special Permit Application
Application pursuant to Remand Decision dated
December 8, 2014 of the Land Court,
10 Misc 529867 (AHS), Newport Materials, et al
v. Planning Board of Westford, et al (the "Decision")

Dear Members of the Board,

Please be advised that this office represents 540 Groton Road, LLC and Newport Materials, LLC (collectively the "Applicant" or "Newport"), regarding the property located at 540 Groton Road (the "Site"). This Special Permit/Variance filing is being done in accordance with the Massachusetts Land Court Decision, Newport Materials, LLC and 540 Groton Road, LLC vs. Michael Green, et al., which Decision is attached hereto. As directed by the Court on page 11 of the Decision, I am hereby requesting a Special Permit pursuant to Section 9.3 of the Bylaw to allow for multiple uses on the Site.

1. SPECIAL PERMIT UNDER SECTION 9.3

In the 33-page Decision (attached and incorporated herein), concerning Newport's proposed asphalt facility, the Court provided direction as to how Newport applications should proceed on remand. Newport" intends to follow each direction of the Court concerning submission of applications for approval of Newport's light manufacturing facility (i.e. asphalt facility), a proposed "use by right," in the remand submissions.

The Land Court states at p. 29 of the Decision: "[It] is difficult to imagine a more suitable location for the construction of an asphalt plant than where Plaintiffs propose to build it, nor a more economically optimal use of Locus than the processing of the products of the next-door quarry." (Decision, p. 29). Newport will file applications with the Westford Planning Board (the "Planning Board") for those permits (site plan approval, MCP and WROPD), which are within the jurisdiction of the Planning Board.

Newport's compliance with the definition of "light manufacturing," a "use by right" in the Industrial A ("IA") zone where the site is located, is accomplished by: (1) Limiting (through installation of sound attenuation barrier) any noise reading to 69 dBa at the westerly border;[1] (2) Newport will stipulate that vehicle trips will not exceed 250 vehicle trips per day; (3) Newport will use electric or natural gas power source for the asphalt facility; (4) Newport will employ 5 or more employees. When Newport accomplishes the above filings on or before January 5, 2015, in accordance with the Decision, the Planning Board will have before it a proposed "use by right" in the IA zone pursuant to sections 3.1, 9.2.2, 9.3.1, 10.1 and Appendix A of the Westford Zoning Bylaw (the "ZBL").[2]

The reason that Newport points out these matters to the Board is because it is relevant to the standard of proof for the requested Special Permit from the Board (multiple uses on one lot), specifically, "no substantial detriment." The Special Permit application to the Board (attached) is to allow for multiple principal uses on the 115-acre Site. The Board Special Permit is decided under a standard of "the proposed use...shall...not cause *substantial detriment* to the neighborhood or the town, taking into account the characteristics of the site and of the proposal in relation to that site." (See Decision, p. 11).

All previous filings and materials made to the Planning Board are incorporated in this filing. Newport presents to the Board a Special Permit request that should be granted "to allow more than one "principal" use on the 115-acre industrial Site because there is no substantial detriment as established, without limitation, by the following:

1. The proposed asphalt facility will meet the requirements of a "use by right" in the IA zone;

2. The minimum lot size for a principal use in the IA zone is 40,000 sq. ft. The site is over 100 times that minimum lot size for a principal use.[3] Currently, there are no less than 5 principal uses on the 115-acre site, and there is no substantial detriment to adding the proposed asphalt facility, a light manufacturing use by right. The Site is located in the Industrial A "IA" zoning district according to the Town of Westford Zoning Map updated through Annual Town Meeting, March 12, 2014. As you may be aware, there are various existing multiple principal uses currently operating on the Site, including storage of materials, storage of trailers and equipment, and various industrial uses such as quarrying, crushing and processing that also have a component of retail sales to

[1] It should be noted that Fletcher Quarry ("Fletcher"), an industrial abutter to the west supports Newport's asphalt plant, a use by right. Notwithstanding support of the westerly industrial abutter, Newport has complied with the 69 dBa sound attenuation. The Decision, p., notes that Newport may consider a waiver request given the support of the westerly industrial abutter.

[2] "[I]f Plaintiffs submits revised plans for the Project that include (a) a commitment to employ five or more employees and (b) plausible means of noise attenuation such that the noise impact on the West Boundary Line would be 69 dBA or less, it is the opinion of this court that the Project would be allowed as of right at Locus, subject to the requirements (discussed below) as to obtaining MCP and WRPOD special permits, as well as a special permit to operate multiple principle uses at the Groton Parcel (which, the court expects, given the multiple uses already being conducted at the Groton Parcel, would be routinely granted)...such a renewed application should also address the issue of whether the Project will include any non-electrical motorized power sources, and whether any such source would be "substantially noiseless and inoffensive." (Decision, p. 29)

[3] The land could be subdivided to create dozens of principal uses.

commercial, industrial, and individual buyers. There are also office building, wood processing and solar power generating uses on the Site. Lastly, although the facility has not been built, a permit has been previously approved that allows a self-storage facility on the Site. A number of these use are considered "Principal Uses" as defined by "Appendix A: Table of Principal Use Regulations" of the Bylaws, including, but not limited to Retail Sales to General Public, Retail Sales to Industrial or Commercial Buyers, Business or Professional Office; General Service Establishment and Quarrying and Mining.

3. As evidenced by Exhibit A attached hereto, Newport meets the six (6) criteria (Section 9.3.2 of the Bylaw), of the Board Special Permit review of "no substantial detriment" in allowing this use by right as part of the multiple principal uses on the 115-acre site.

2. SPECIAL PERMIT UNDER SECTION 3.6.2

In the alternative, or as part of a Special Permit sought under Section. 9.3.1 of the Bylaw (see Decision, p. 11),[4] Section 3.6 of the Bylaw, also allows the Board to grant a Special Permit for a "change or extension" of a pre-existing nonconforming use. The Site is pre-existing non-conforming as to multiple principal uses on a lot, as a number of the existing principal uses have been in place since the turn of the century. The history of multiple principal uses existing at the site prior to any zoning restriction (the valid pre-existing nonconforming use of "multiple principal uses") is well known and has been documented as part of past litigation and permitting relative to the Site. While some of the uses are allowed (i.e. Quarrying, Solar farm), others are pre-existing non-conforming principal uses (i.e. Retail Sales to Industrial and Commercial Buyers and General Services Establishment). Whereas a number of these uses are pre-existing non-conforming principal uses and whereas the existing operation of multiple uses on the Site is, in and of itself, a pre-existing non-conformity, my client is alternatively seeking a Special Permit to expand the existing non-conformance of multiple principal uses on the site to include an additional principal use (i.e. Light Manufacturing facility).

A "change or extension" of the pre-existing multiple principal uses on the 115-acre site can be granted if the change or extension is found by the Board to not be *substantially more detrimental* than the existing nonconforming use (multiple principal uses) to the neighborhood. The addition, change or extension of "multiple principal uses," the pre-existing nonconforming use, is not *substantially more detrimental* where the proposed asphalt facility is a "light manufacturing" use by right on a 115-acre site in the LA zone. In the LA zone there can be a

[4] "[T]he matter is remanded to the Board for further proceedings consistent with this decision." (Decision, p. 1). "[I]t is the opinion of this court that the Project would be an ideal use of Locus, given its proximity to the Fletcher Quarry and Newport's rock crushing facility, and based upon the overall industrial nature of the area. And, while Defendants' concerns as to the noise impact and traffic impact of the Project are perfectly legitimate, Plaintiff has signaled a willingness to agree to build noise attenuation barriers and to stipulate to a maximum number of vehicle trips, which would appear to be a perfectly reasonable way to accommodate Defendants' concerns. Any other issues as to compliance with the letter of the Bylaw would seem to be minor issues resolvable through variances. In sum, this dispute should have been resolved long before it came before this court. Yet, the parties' inability or unwillingness to resolve their disputes has resulted in over four years of costly litigation, including two summary judgment motions, numerous other procedural motions, and a three-day trial – all of which might have been avoided." (Decision, p. 33)

principal use per each 40,000 sq. ft. minimum lot size, see Bylaw Appendix C). The analysis for this alternative basis for grant of the Special Permit by the Board is the same under the six (6) criteria for issuance of a Special Permit – no substantial detriment caused by addition of the asphalt facility (See Exhibit A).

3. USE VARIANCE UNDER SECTION 9.2.2

Pursuant to Section 9.2.2(2) of the Bylaw, the Board also has the power to grant dimensional and use variances. Pursuant to Section 3.1.1 of the Bylaw, "Not more than one principal use or structure shall be allowed on any lot, except as otherwise may be provided herein." In the event the Zoning Board of Appeals finds Sections 9.3 and/or 3.6.2 are not applicable in allowing an additional principal use on the Site, the Applicant hereby requests that the Zoning Board grant a use and or dimensional Variance from Section 3.1.1 of the Bylaw pursuant to Section 9.2.2(2) to allow for an additional principal use on the Site.

In Exhibit B, attached and incorporated herein, Newport presents the basis for the grant of a variance to allow the light manufacturing facility, a "use by right", as an additional principal use on the 1.15-acre site.

We look forward to working with the Board toward approval of this application, and ending what has been an expensive and unnecessary expense for Newport and the Town of Westford (see footnote 3 above). Enclosed, please find an application for the Special Permit and Variance being requested as well as all required supporting materials, filing fees and advertising fees. Kindly schedule this matter in accordance with the schedule dictated in the attached decision.

Thank you for your time and consideration in this matter. The Applicant reserves the right to further supplement or modify this filing. Please contact me should you require any further information.

Sincerely,
Deschenes & Farrell, P.C.

Douglas C. Deschenes

Douglas C. Deschenes

Enclosures.

EXHIBIT A

Special Permit Criteria:

Granting of the Special Permit will not cause substantial detriment to the neighborhood or the town, taking into account the characteristics of the Site and the proposal in relation to the Site. As previously stated, the Site is located in the Industrial A zoning district and the proposed additional principal use is an allowed use in the district. Furthermore, the Site encompasses over 110 acres and has historically contained multiple principal uses some of which are allowed by right and others that are preexisting non-conforming. The Site abuts heavy industrial uses and has no direct residential abutters. All operations on the Site, including the proposed Light Manufacturing facility are set significantly back from the Site access (Route 40), such that all operation are barely perceptible to abutters and motorists passing the site.

In reviewing the possible impacts to the neighborhood and the town, please consider the following:

The proposal will serve social, economic and community needs. The additional principal use will provide increased tax revenue, employment opportunities and local access to products which are utilized in public and private development and improvement projects. The proposal will provide for safe traffic flow including parking and loading. The proposed use meets or exceeds the traffic and loading requirements under the applicable Bylaws. My clients, pursuant to the above reference court proceedings have agreed to limit the daily truck traffic generated by the Light Manufacturing facility in order to conform to safe traffic standards established by the Town of Westford's Traffic consultants.

There are adequate utilities and public services available to the site as sufficient water, electricity, sanitary services, telephone and data lines, and roadways are readily available to serve the Site. This is evidenced by the fact that the multiple existing uses on the Site are currently adequately served and the proposed use will not require any additional utilities or public services.

The proposed use is consistent with the neighborhood character and social structures. The proposed Light Manufacturing facility is an "allowed by right" use in the IA zoning district. The abutting properties all contain light and heavy industrial and commercial uses. All of the existing uses on the Site are consistent with those surrounding uses. There are no direct residential abutters. Furthermore, as previously stated, the Site encompasses over 110 acres and has historically contained multiple principal uses some of which are allowed by right and others that are preexisting non-conforming. There is more than ample room on the Site for the additional use.

The proposed additional principal use will not be detrimental on the natural environment. The proposed location for the Light Manufacturing facility has been radically disturbed from its natural condition as it was previously part of the quarry operation existing on the site for over 100 years. It is essentially completely devoid of any natural vegetation. The ground has been excavated and filled numerous times. As proposed, the facility will meet or exceed all local and state wetland regulations. Furthermore, extensive health risk, storm water management, traffic, sound, and air quality studies of the proposed facility as part of the Planning Boards review have

determined that the facility will not pose a health risk to the surrounding environment or those living in the surrounding area.

The Light Manufacturing facility will result in an increased property value for the Site and so an increased tax base for the Town which will generate additional tax revenue to the Town. Furthermore, the facility will generate new employment opportunities not only at the facility but also within the industry utilizing the products produced. The availability of the products produced will also generate increased business opportunities and possibly cost savings within the construction industry thus adding to the overall health and growth of the local economy. While the proposed facility will provide some additional demand on local services, (i.e. police, fire, roadways), given the existing uses on the Site and the safety of the facility as a "state-of-the art" manufacturing facility, this increased demand will be de minimis and certainly offset by the positive fiscal impacts generated.

In summary, the proposed additional principal use and the allowance of an additional principal use on the Site will not cause "substantial detriment to the neighborhood or town" (emphasis added). Therefore, granting of the Special Permit is justified.

EXHIBIT B

Variance Criteria:

The Site is clearly unique as to its soils, shape and topography which creates hardship relative to the utilization of the site for its intended and allowed purposes. The site is very large, encompassing over 110 acres yet has a relatively small amount of road frontage and only a single access point. The location of hydric soils and wetlands on and about the Site severely limit the access to the Site and impact the location of uses within the Site. Given the historic quarrying operations on the Site, a majority of the soils on the Site have been dramatically altered by way of excavation and filling activities. These activities have also resulted in significant topography changes (i.e. pits to piles) and alterations to natural contours. The Site is also a "split lot" whereby it is bisected by a town line (i.e. Westford/Chelmsford) creating shape hardship relative to each Town's area, setback and use regulations. Overall, the unique nature of the Site creates hardships relative to the allowed and practical uses of the Site.

The unique soil conditions, shape and topography of the Site do not generally affect the zoning district in which it is located. While the abutting Fletcher quarry may share some of the unique qualities of the Site, they were in fact originally part of the same parcel. However unique conditions of the Site are not generally shared among the IA zoned areas of Westford. I do not believe any other split lot IA zoned parcels exist. The majority of Industrial A land in Westford does not share these conditions, they are unique to the Site.

A literal enforcement of the provisions of the Bylaw would involve substantial hardship, financial or otherwise, to the petitioner. Denial of the Variance will result in a financial hardship to the Applicant due its inability to utilize such a large parcel for its intended and allowed purposes. The site has historically had multiple principle uses. This is not unusual or unreasonable given the size of the Site. In fact, many commercial sites in the Town of Westford (most of which are smaller than the Site), contain multiple principal uses on a single lot. Moreover, it is true that multiple principal uses on single lots have been allowed and continues to be approved by the Planning Board without requiring a variance. Denial of the Variance in this instance would create a financial hardship to the Applicant who has and continues to pay real estate taxes based on the allowed uses on the property and has a large parcel of land which can more than reasonably support multiple uses.

The desired relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Bylaw. It has been determined through the Planning Board review of the proposed use and in the subsequent appeals (see attached decision), that the proposed Light Manufacturing facility will not constitute a public health or safety hazard. Furthermore, as discussed above, the use will provide public benefits in terms of employment opportunities, added tax base and revenue. In fact, throughout the Planning Board and appeal processes no substantial detriment associated with the proposed use was determined to exist.

Regarding the intent of the Bylaw, it can be reasonably assumed that the purpose and intent of the prohibition of multiple uses on a lot is to protect public health, safety and welfare by providing for adequate space for uses and that adequate services and utilities are available to

those uses. In the Industrial A Zone a parcel must be a minimum of 40,000 square feet in size. It is therefore reasonable to expect that no more than one principle use would be allowed on a parcel meeting or just exceeding the minimum requirement. However, in the instant case, not only has no substantial detriment been identified but the site exceeds the minimum lot size requirement by over 100 times. Clearly, it can be shown that sufficient area exists for multiple uses. It has also been shown that adequate services and utilities are available to the site for multiple uses. Therefore the relief can be granted without derogating from the purpose and intent of the Bylaw.

TOWN OF WESTFORD
ZONING BOARD OF APPEALS
55 Main Street
Westford, Massachusetts 01886
TEL (978) 692-5524 FAX (978) 399-2558

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TOWN CLERK
WESTFORD

Special Permit - ZBA 1501

Date: December 31, 2014

Pursuant to the provisions of Section 9.3 * and Section 9.3 of the Zoning Bylaw, the undersigned hereby makes application for a Special Permit for the premises located at 540 Groton Road in the following respect extension of a pre-existing non-conforming use (i.e., multiple principal uses on single lot).

Said premises are located within a IA District, a District in which the above requested use is only allowed with the granting of a Special Permit. Therefore, a hearing before the Town of Westford Zoning Board of Appeals is requested at its next meeting.

The reasons for the above request are as follows: Special Permit for multiple principal uses on a site pursuant to Section 3.1 of the Bylaw. This application is in conformance with the remand from Land Court in the matter of Newport Materials, LLC and 540 Groton Road, LLC vs. Michael Green, et al.

FEE: $200.00

OWNER OF PROPERTY: 540 Groton Road, LLC and Newport Materials, LLC

MAILING ADDRESS: 164 Burke Street, Nashua, NH 03060

PHONE AT WORK: 1-603-882-1700 HOME:

SIGNATURE OF OWNER:

PETITIONER (If other than owner):

MAILING ADDRESS:

PHONE AT WORK: HOME:

SIGNATURE OF PETITIONER:

* and any other permit relief as may be required under the Westford Zoning Bylaw to allow the proposed use.

rev. 10/05

TOWN OF WESTFORD
ZONING BOARD OF APPEALS
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Westford, Massachusetts 01886
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WESTFORD

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Special Permit - ZBA 1508

Date: December 31, 2014

Pursuant to the provisions of Section 3.6.2* and Section 9.3 of the Zoning Bylaw, the undersigned hereby makes application for a Special Permit for the premises located at 540 Groton Road in the following respect: Extension of a pre-existing non-conforming use (i.e., multiple principal uses on single lot)

Said premises are located within a LA District, a District in which the above requested use is only allowed with the granting of a Special Permit. Therefore, a hearing before the Town of Westford Zoning Board of Appeals is requested at its next meeting.

The reasons for the above request are as follows: For the extension of a pre-existing non-conforming use on the property to allow for an additional principle use where multiple principal uses currently exist. This application is in conformance with the remand from Land Court in the matter of Newport Materials, LLC and 540 Groton Road, LLC vs. Michael Green, et al.

FEE: $200.00

OWNER OF PROPERTY: 540 Groton Road, LLC and Newport Materials, LLC

MAILING ADDRESS: 164 Burke St., Nashua, NH 03060

PHONE AT WORK: _____ HOME: _____

SIGNATURE OF OWNER: _____

PETITIONER (if other than owner): Richard A. DeFelice

MAILING ADDRESS: 164 Burke St., Nashua, NH 03060

PHONE AT WORK: _____ HOME: _____

SIGNATURE OF PETITIONER: _____

* and any other permit or relief as may be required under the Westford Zoning By-Law to allow the proposed use/project.

rev. 10/05

TOWN OF WESTFORD
ZONING BOARD OF APPEALS
55 Main Street
Westford, Massachusetts 01886
TEL (978) 692-5524 FAX (978) 392-2558

Variance - ZBA 1503

Date: December 31, 2014

Pursuant to the provisions of Section 9.2.2 of the Zoning Bylaw, the undersigned hereby petitions your Board for a Variance from the terms of Section 3.1.1* which will allow the construction or addition to the dwelling or building located at: 540 Groton Road

The proposed construction will include: To allow an additional principal use on the lot. This application is in conformance with the remand from Land Court in the matter of Newport Materials, LLC and 540 Groton Road, LLC vs. Michael Green, et al.

It is the opinion of the petitioner that unless relief is granted by your Board, substantial hardship, as defined in Section 9.2.2-(2) will result. A hearing is therefore requested at your next Board Meeting.

FEE: $200.00 ZONING DISTRICT: IA

Is your project subject to review by other Westford Boards/Committees?

If yes, please identify:

Owner of Property: 540 Groton Road, LLC and Newport Materials, LLC

Mailing Address: 164 Burke St., Nashua, NH 03060

Phone: Work: Home:

Signature of Owner(s):

Petitioner (if other than owner): Richard A. DeFelice

Mailing Address: 164 Burke St., Nashua, NH 03060

Phone at Work: Home:

Signature of Petitioner:

* and any other permit relief as may be required under the Westford Zoning By-Law to allow the proposed use/project.

rev. 10/05